Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

RICHARD T. KEEVER,
Petitioner,

v.

CITY OF MIDDLETOWN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHERE AN EMPLOYER OFFERS A DISABLED, BUT OTHERWISE QUALIFIED EMPLOYEE A REASSIGNMENT AS AN ACCOMMODATION, IS THAT ACCOMMODATION "REASONABLE" WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT WHERE THE EMPLOYER, FOR DISCRIMINATORY REASONS, DELIBERATELY CHOOSES A REASSIGNMENT TO AN UNDESIRABLE POSITION WITH LESS RESPONSIBILITY AND STATUS?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner requests that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on May 29, 1998, which affirmed a ruling by the United States District Court for the Southern District of Ohio, Western Division on December 19, 1996 granting Respondent's Motion for Summary Judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals is contained in the Appendix at App. 1a. It has been recommended for a full text publication. The opinion of the Judge of the United States District Court for the Southern District of Ohio, Western Division, is contained in the Appendix at App. 12a, and is not reported. It is cited as Keever v. City of Middletown, No. C-1-95-716 (S.D. Ohio, Dec. 19, 1996).

JURISDICTION

The opinion of the Court of Appeals to be reviewed was entered on May 29, 1998. Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit in this cause, by Writ of Certiorari, is conferred on this Court by 18 U.S.C. § 1254(1).

STATUTES INVOLVED

The Americans With Disabilities Act of 1991, 42 U.S.C. § 12101 et seq.;

42 U.S.C. § 12101(b);

42 U.S.C. § 12111(9);
42 U.S.C. § 12112
Part 29 C.F.R. 1630 Appendix § 1630.2(o).

The text of these provisions is set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

Petitioner, Richard T. (Tim) Keever, served as a uniformed police officer for the City of Middletown from 1978 until he left the employment of the police force in November of 1993. During most of his employment, Petitioner was a beat patrolman who performed the usual functions of a police officer, riding the squad car, handing out speeding tickets, apprehending criminal suspects, etc. He was, at all times material herein, represented by the Fraternal Order of Police (FOP) which was the exclusive bargaining representative for all non-supervisory police officers in the City of Middletown. Over the years, the FOP and the City have negotiated a series of collective bargaining agreements which covered all police officers, including Petitioner.

Throughout his career, Petitioner enjoyed better than average or superlative ratings except in the area of attendance, which will be discussed in further detail infra. He was also cited on numerous occasions for acts of bravery and heroism in the line of duty, including, on a number of occasions, rescuing individuals from great peril. (See Affidavit of Petitioner, ¶ 2, App. 41-42a).

Beginning in the 1980's, Petitioner began suffering a rash of on-the-job injuries. These stemmed from his being frequently forced to subdue criminal suspects. Due to his diminutive stature, he was severely roughed-up in these

encounters. As a result, he suffered substantial, long-lasting injuries to his neck, shoulder, back and legs. As these injuries mounted, they began to have an adverse effect of Officer Keever's attendance. Either he was under such physical pain from performing the high-stress aspects of his job, (e.g. jumping in and out of squad cars, running to arrest scenes, apprehending suspects, etc.) that he was physically unable to report to work. Or, the medicines he took to control the pain had side effects (e.g. lightheadedness, dizziness, sleepiness) which rendered him incapable of performing his job. As a result of all of this, Officer Keever's rate of absenteeism increased significantly.

In the wake of these injury-induced absences, Officer Keever, either through his own efforts or those of the FOP, repeatedly asked the City for one of several accommodations:

(1) He first asked that his injury-induced absences be charged against his injury leave account rather than his sick leave account.[1] From Petitioner's perspective, injury leave was far more preferable in that its utilization to recover from the side effects of his on-the-job injuries would allow him to accrue sick leave for future use in case he was truly sick. Respondent refused this accommodation outright, arguing that Petitioner should take sick leave, and unilaterally began

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[1] Collective Bargaining Agreements going back several years, provided for both sick leave and injury leave, Sick leave was accrued at the rate of 10 hours for each calendar month of service and could be accumulated over the years without limit. Injury leave was used when recovering from job-related injuries, such as those suffered by Petitioner in this case. However, injury leave, unlike sick leave, could not be accumulated. Instead the injured officer received up to six months of paid time off for each on-the-job injury.

debiting Petitioner's sick leave account for each injury-related absence. Even though Petitioner prevailed in a grievance filed by the FOP over this issue, and won the right to utilize his injury leave, the City soon thereafter reneged on the grievance settlement and began debiting his sick leave account again, thus refusing Officer Keever's accommodative request that he be allowed to utilize his injury leave.

(2) Another accommodation requested by Officer Keever was permanent assignment to the 11:00 p.m. to 7:00 a.m. shift, to which he was already entitled to by virtue of his relatively high seniority ranking.[2] His absences had decreased substantially whenever he had worked that shift in the past, because the workload was less demanding and less stressful. However, Respondent, through its Assistant to the Police Chief, Major Russell Hess, refused this accommodation and removed him from the 11:00 p.m. to 7:00 a.m. shift even though he conceded in a memorandum (App. 63-65a) that Petitioner's attendance had improved when he was on the 11:00 p.m. to 7:00 a.m. shift and that a transfer of Petitioner to a busier shift would be detrimental to his health. Instead he assigned Petitioner to a shift with far more stress, which exacerbated his musculo-skeletal pain and resulted in more

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[2] As of June, 1993, from the time these accommodative requests were being made, Petitioner was ranked no. 21 out of 69 police officers on the Seniority List. (See Seniority List, App. 48-51a). While not specifically provided for in any of the Collective Bargaining Agreements between the Respondent and the FOP, shift preference for patrolman in the various platoons was, according to custom and usage in the department, governed by police department seniority. The testimony on this issue was uncontroverted and conceded by both sides. (See Deposition of Police Chief Smith, App. 52-55a; Affidavit of FOP President John Magill, ¶ 3, App. 72a).

absences.

(3) Finally, Officer Keever and FOP President Magill also asked Respondent to transfer him to a vacant position as a detective where there would be less day-to-day strenuous physical activity. (Magill Affidavit ¶ 5-8, App. 72-74a). He had in the past served in this capacity without any difficulties. (See Keever Affidavit, ¶ 11, App. 46a). However, again the Respondent flatly refused to give him a transfer citing the fact that his repeated absences and consequent "unreliability" rendered him unfit to become a detective. (See FOP President Magill Deposition at 106, App. 67-68a; Police Chief Earl Smith Deposition, App. 57-60a). Notably, other police officers whose physical ailments and injuries prevented them from continuing as beat patrolman were in fact allowed transfer into the detective division. Hess Deposition at 156 (App. 84a); FOP President Magill Affidavit, ¶ 6 at (App. 73a). Magill also took up Petitioner's request (Magill Affidavit, ¶ 8, App. 74a).

Having rejected all three of Petitioner's request for accommodations, Respondent devised an accommodation of its own -- reassignment of Petitioner to the position of "Desk Officer." This position entailed sitting at a desk in the police department, handling citizen inquiries and complaints in person or by telephone and other routine and mundane duties. (Keever Affidavit, ¶ 9, App. 45-46; Magill Affidavit, ¶ 10, App. 74-75). Petitioner rejected this offer on the basis that it was a demotion, not in terms of money or benefits but in challenge and responsibility. By all accounts, both from representatives of the City as well as Officer Keever and the FOP, the desk officer job was looked upon with disfavor amongst both management and employees as a very undesirable, low prestige position to which officers were assigned either because they were incompetent, inexperienced

or insubordinate. Keever Affidavit, ¶ 9, App. 45-46a; Magill Affidavit, ¶ 10, App. 74-75a). Even the City concedes the demeaning nature of a desk job assignment as evidenced by a series of internal memos written between supervisory officers of Respondent. (See App. 78-83a).

The City's denial of Officer Keever's reasonable accommodation requests was reflective of its general overall hostility and bias towards Petitioner because of his disability. Petitioner's supervisors accused him of faking his injuries, malingering, "f...ing the system" and "goofing off" when he should be working. Respondent removed Petitioner from the department's S.W.A.T. Team and Water Rescue Team, units in whose membership Petitioner had taken great pride, based on its belief that Petitioner was undependable and unreliable. For much the same reason, Respondent also deprived Petitioner of the opportunity to sign up for off-duty extra pay assignments such as patrolling high school football games, H.U.D. Projects, etc. In the early 1990's, Police Chief Earl Smith and second in command Major Russell Hess made no secret of their intent to force Office Keever to retire involuntarily from the police department based on what they perceived as his "medical unfitness" to continue on as a police officer and his increasing rate of absenteeism. Such sentiments were even voiced to FOP President Magill (Smith Deposition at 121, App. 61-62a; Hess Deposition at 156, App. 84-85a; Magill Deposition at 67, App. 66a). As noted earlier, the City, in its attempt to force Petitioner out of the police department, reneged on the grievance settlement reached earlier and began charging Officer Keever's injury-related absences to sick leave based on its old and erroneous interpretation of the FOP agreement. The Petitioner was forced to take more and more sick leave until he had virtually exhausted his entire allotment and was on the verge of having to take leave without pay. (Keever Affidavit at ¶ 6(H), App.

44a).

Respondent's efforts were ultimately successful. Faced with mounting pressure both from having exhausted his sick leave and also from being forced to work as a beat cop and enduring as he did the stress and musculoskeletal pain that accompanied it, as well as the verbal abuse for utilizing the injury or paid leave to which he was contractually entitled, Petitioner took early retirement. (Keever Affidavit at ¶ 6 and 7, App. 43-45a). As a result of his retirement, Officer Keever now earns a pension which is a fraction of his salary as a police officer. (Keever Affidavit at ¶ 12, App. 46a).

Petitioner filed his original Complaint in the United States District Court for the Southern District of Ohio, Western Division, on August 25, 1995, alleging inter alia that the City of Middletown discriminated against him on the basis of his disability, and thus violated the Americans with Disabilities Act (ADA) when it refused to offer him a reasonable accommodation. This action was properly heard by the United States District Court pursuant to 28 U.S.C. § 1331 in that this action presented a federal question arising under the laws of the United States, specifically 42 U.S.C. § 12101, et seq. Pendant state claims were properly heard pursuant to 28 U.S.C. 1367 and Federal Rules of Civil Procedure 18(A).

After lengthy discovery by both parties, Respondent filed a Motion for Summary Judgment seeking dismissal of all of Petitioner's discrimination claims. On December 19, 1996, the district court granted Respondent's Motion for Summary Judgment. Petitioner filed a timely appeal to the United States Circuit Court of Appeals for the Sixth Circuit. On May 29, 1998, the Sixth Circuit panel hearing the case affirmed the district court's granting of summary judgment.

The primary issue before the Sixth Circuit on appeal was whether the desk job assignment offered by Respondent was a reasonable accommodation. The Sixth Circuit correctly cited 29 C.F.R. Part 1630, Appendix § 1630.9(a) for the proposition that when a reasonable accommodation is offered by an employer to an employee, and the employee chooses to reject that accommodation, he is deemed unable to perform the essential elements of the position, and thus is not considered a "qualified individual with a disability." The Sixth Circuit also correctly held that when there exists an array of reasonable accommodations that are available to an employee, the employer is not legally obliged under the ADA to give the employee the most reasonable or effective accommodation, or even the accommodation preferred by the employee. Rather, the employer complies with the ADA if it affords the employee any one of the reasonable accommodations. The Sixth Circuit cited four criteria set forth in 29 C.F.R. Part 1630 Appendix § 1630.9(a) which must be met in order for an accommodation to be reasonable. The employer must consider: (1) the particular job involved; its purpose; and its essential functions; (2) the employee's limitations and how those limitations can be overcome; (3) the effectiveness an accommodation would have in enabling the individual to perform his job; and (4) the preference of the employee. Applying these four criteria to this case, the Sixth Circuit, concluded that the City's offer of a desk job to Petitioner satisfied at least three out of the four of the criteria because the job involved skills elementary enough and non-taxing both physically and mentally that Petitioner would be able to carry out the responsibilities on the desk:

> We find no error in the decision that offering Keever a desk job where his physical and mental responsibilities are significantly reduced, in combination with allowing him to

> take leave when necessary, is a reasonable accommodation for his type of injury.

(App. 10a.)

In so holding, the Sixth Circuit squarely rejected Petitioner's argument that the ADA required more scrutiny into the employer's choice accommodation to determine whether it was so demeaning or undesirable as to suggest it was offered as a subtle attempt to discriminate against the disabled employee, and therefore was not a "reasonable" accommodation.

QUESTION PRESENTED FOR REVIEW

WHERE AN EMPLOYER OFFERS A DISABLED, BUT OTHERWISE QUALIFIED EMPLOYEE A REASSIGNMENT AS AN ACCOMMODATION, IS THAT ACCOMMODATION "REASONABLE" WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT WHERE THE EMPLOYER, FOR DISCRIMINATORY REASONS, DELIBERATELY CHOOSES A REASSIGNMENT TO AN UNDESIRABLE POSITION WITH LESS RESPONSIBILITY AND STATUS?

ARGUMENT

The duty of an employer to offer reasonable accommodations to disabled but otherwise qualified employees is beyond dispute. It is rooted in the very statute itself, which specifically lists failure to make reasonable accommodations as one amongst many ways in which an employer discriminates against qualified individuals with disabilities. See, 42 U.S.C. § 12112(a) and (b)(5)(A) (App. 33-35a). In defining reasonable accommodation, the Act lists several measures an employer can take, including "reassignment to a vacant position." 42 U.S.C. § 12111.9(B) (App. 33a).

The EEOC through its implementing regulations has ruled that in order to establish whether an accommodation is reasonable, the employer must consider (1) the particular job

involved, its purpose and its essential functions; (2) the employee's limitations and how those limitations can be overcome; (3) the effectiveness an accommodation would have in enabling the individual to perform the job; and (4) the preference of the employee. 29 C.F.R. Part 1630 Appendix 1630.9(a). In reliance on this EEOC interpretive regulation, the Sixth Circuit focused primarily in the first three criterion without giving any attention to the fourth criteria, i.e. the preference of the employee. In essence, since the desk job was such that it could be physically performed by Officer Keever and called for skills consistent with his physical limitations, it was, perforce, a "reasonable" accommodation. The fact that Officer Keever regarded that position as one of less responsibility and hence carrying with it a lower status, was immaterial. Even though Officer Keever, either himself or through his union, proposed several other effective accommodations which would either allow him to stay in his current capacity but on a less stressful shift or be reassigned to a detective position which called for less physical and more cerebral skills, the Sixth Circuit, citing its earlier decision in Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996), held nonetheless that while there might exist other reasonable accommodations, an employer is only obliged to offer the accommodation it itself prefers so long as it is reasonable, notwithstanding the wishes of the employee.

The Sixth Circuit is not alone in adopting this rationale. Other circuits also hold that where there exist numerous reasonable accommodations, the employer is free to pick whatever one it chooses, even if it is contrary to the wishes of the employee. And, if the employee rejects that accommodation, he cannot be deemed a qualified individual with a disability, and therefore, is outside the protection of the ADA. See, e.g., Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-1286 (11th Cir. 1997);

Daugherty v. City of El Paso, 56 F.3d 695, 698 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1263 (1996); Schmidt v. Methodist Hospital of Indiana, 89 F.3d 342, 344-345 (7th Cir. 1996). However, all of these cases focus exclusively on the question of whether the reassignment proffered by the Employer is vocationally feasible, i.e., whether or not it can be performed by the employee consistent with his physical or mental limitations. Very little, if any, weight is given to the employee's perception of the desirability of the reassignment.

However, the Circuit Courts' analytical approach runs directly contrary to the stance of the Equal Employment Opportunity Commission (EEOC). In 29 C.F.R. Part 1630, Appendix 1630.2(o), the EEOC stressed the crucial importance of the status of the job to which the employee would be reassigned and the extent to which the responsibilities associated with the reassigned job were significantly diminished from the responsibilities inherent in the previous job. The EEOC was concerned that disability-biased employer might offer a reassignment to a disabled employee in the guise of an accommodation by offering him a less desirable or less prestigious job:

> "Reassignment may not be used to limit, segregate or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions, offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified . . . "

(29 C.F.R. Part 1630, Appendix 1630.2(o)) (App. 39a) (emphasis added) (See also App 40a).

The EEOC's position is hardly novel. Reassignment of employees from more desirable to less desirable jobs for statutorily impermissible reasons is an unmistakable badge of discrimination prohibited by Title VII of the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and a host of other federal anti-discrimination statutes. It is one amongst many "material adverse employment actions" that must be scrutinized by the courts. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-254 (1981), 67 L.Ed.2d 207, 107 S.Ct. 1089 (1981).

Such a hostile backdrop exists in this case. Several examples exist of Respondent's unlawful resentment and treatment of Petitioner because of his disability. (1) He was continually berated by all levels of his supervisory hierarchy because of his disability-related absences. He was accused of malingering, and castigated as undependable. (2) Respondent's open and outspoken efforts to pressure Petitioner into involuntary retirement is a matter of record. (3) Respondent rejected Officer Keever's accommodative request for reassignment to a detective position on the basis that he was unreliable, notwithstanding the fact that it has already been demonstrated that such a more sedentary position would have been consistent with his physical limitations. By contrast, other individuals with varying degrees of disability had in the past been transferred to detective positions when they could no longer serve as a beat patrolman. Disparate treatment in the way employees are assigned is another hallmark of unlawful discrimination. (4) Finally, the availability of injury leave to Petitioner, which is widely acknowledged itself as a reasonable accommodation, Hankins v. The Gap, Inc., supra, was unlawfully denied. Moreover, even if Respondent was correct forcing Petitioner to use sick leave rather than injury leave, it still penalized Petitioner for

using his sick leave allotment, by, among other things, removing him from the S.W.A.T. Team and Water Rescue Team, and denying him a position as a detective, based on his excessive absenteeism as a beat patrolman. Penalizing an employee for availing himself of an accommodation to which he is lawfully entitled is tantamount to denying him the accommodation altogether. Fritz v. Mascotech Automotive Systems Group, Inc., 914 F.Supp. 1481 (E.D. Mich. 1996).

Respondent's decision to reject all of Officer Keever's reasonable accommodations and instead assign him to a demeaning desk job position fits hand in glove with Respondent's discriminatory mind set. As noted earlier, the desk officer's job was held in low esteem by both management and employees. Even Respondent admitted to this in a series of internal memos (App. 78-83a).

The following quotes from those memos are instructive:

(1) "If no one want a straight desk, I would make it a six month rotation starting at the bottom [presumably of the Seniority List]" (App. 78a). (emphasis added).

(2) "I would continue the six month rotation. It has not caused any problems and is accepted. It does not have the appearance of punishment or hiding someone on the desk." (App. 79a) (emphasis added).

(3) Midnight desk - reason J. Brown fits into the desk is that she has a problem

and good reason to remain on midnights. To my knowledge, she has not worked any other shift, nor do I believe she has worked the desk. Giving her the benefit of not moving her, I have placed her in what seems to be the least desirable midnight position. (App. 80a) (emphasis added).

(4) "If no one wants the day desk, I will have to assign it to one of your now [new] 11 men to it. (App. 81a).

(5) The reason I recommended [name indecipherable] was because of his low productivity (emphasis added) Still, if the day desk officer is rotated every six months, in reality, none of the older officer should ever have to work it because of changes every year. (App.82-83a) (emphasis added).

However, this retaliatory dynamic was altogether overlooked or ignored by the Sixth Circuit. The only relevant factors to be examined were whether Petitioner could physically perform the desk job and whether the tasks therein were consistent with his physical and medical capabilities, and whether there was any diminution in pay or benefits. Since the desk job met these criteria, Respondent was altogether free to force him into that "reasonable" accommodation. This analysis has also been embraced by other circuits. See, Stewart v. Happy Herman's, supra.; Daughtery v. City of El Paso, supra.; Schmidt v. Methodist Hospital, supra. However, the failure of the courts to scrutinize the potentially demeaning nature of the reassignment, especially against the

backdrop of animus and resentment towards the disabled employee, provides a safe harbor for any employer who wishes to discriminate against disabled or otherwise qualified employees and force them out of the work force.

For instance, suppose a trial attorney in a law firm suffers a stroke to the point where he or she were no longer able to think or react quickly in a courtroom. Were the firm of a mind to terminate the employee, it could summarily reject the attorney's request for accommodation in the form of a reassignment to a more contemplative position, such as a brief writer, or other challenging non-trial work which the attorney would be fully capable of performing. Instead it could "accommodate" the attorney by assigning him or her to shephardize cases or do library filing, at the attorney's same rate of pay. Under the Sixth Circuit's analysis, that would be a "reasonable accommodation" inasmuch as the work would be well within the attorney's physical and mental capabilities and would not involve a loss in pay. However, by rejecting alternative challenging assignments and instead relegating him to demeaning and low status work, the firm would be sending a clear and unmistakable message that the disabled attorney was no longer welcome.

To characterize such accommodations as "reasonable" frustrates the congressional mandate of the ADA to eliminate discrimination against individuals with disabilities in all of its forms (42 U.S.C. 12101(b), App. 32a). This is precisely why the EEOC promulgated interpretive rule § 1630.2(o), to ensure that employers could not, under the cloak of an accommodation, reassign qualified individuals with disabilities into undesirable or demeaning job slots, especially when other reasonable accommodations exist, in order to discriminate against them. Such an interpretative regulation is entitled to great deference. As the Supreme Court has

admonished lower federal courts on several occasions,

> As an "administrative interpretation of the Act by the enforcing agency," these Guidelines, "while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort as guidance."

Meritor Savings Bank v. Vinson, 477 U.S. 57, 55, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986) (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-142, 97 S.Ct. 401, 410-411, 50 L.Ed.2d 343 (1976); and Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S.Ct. 849, 855, 28 L.Ed.2d 158 (1971)).

This case thus provides an ideal vehicle for this court to harmonize the decisions of the various circuits which allow an employer unfettered choice as to the accommodations it wishes to force on employees with the EEOC's broad interpretation of the ADA to accomplish it remedial ends. Otherwise, if the Sixth Circuit decision below, as well as similar decisions of other circuits are allowed to stand, employers will be encouraged to punish disabled but otherwise qualified employees by forcing them into undesirable, demeaning jobs of lesser status in the hopes that they will ultimately quit their employment.

The unlimited authority of employers to pick and choose which accommodations it wishes to make is just one more in a series of hurdles lower courts place before disabled employees who attempt to prosecute their discrimination claims. It often serves as a basis for summary judgment as the case sub judice and above-cited cases from other federal

circuits illustrate. It should thus not come to anyone's surprise that according to a recent survey by the American Bar Association, over 90% of ADA complaints are ultimately dismissed prior to trial.[3] These very disturbing figures provide one more reason for this Court to grant a Writ of Certiorari in this case.

CONCLUSION

For all the reasons set forth above, this Court should grant a Writ of Certiorari to the Sixth Circuit.

Respectfully submitted,

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[3] Volume 7, Americans with Disabilites Act Manual No.12 at 72, citing American Bar Association survey to be published in the May-June issue of Mental and Physical Disability Law Reporter.

APPENDIX

APPENDIX A

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO AT CINCINNATI
NO. 95-00716 — TIMOTHY S. HOGAN,
MAGISTRATE JUDGE

Argued: January 27, 1998

Decided and Filed: May 29, 1998

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant To Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0167P
(6th Cir.)
File Name: 98a0167p.O6

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD T. KEEVER, *Plaintiff-Appellant,*	)	
v.	)	No. 97-3078
CITY OF MIDDLETOWN, *Defendant-Appellee.*	)	

Opinion - No. 97-3078, 5/29/98

Before: WELLFORD, RYAN, and SILER, Circuit Judges.

COUNSEL

ARGUED: Donald B. Hordes, SCHWARTZ, MANES & RUBY, Cincinnati, Ohio, for Appellant. Robert J. Gehring, LAW FIRM OF ROBERT J. GEHRING, Cincinnati, Ohio, RUBY, Cincinnati, Ohio, for Appellant. Robert J. Gehring, LAW FIRM OF ROBERT J. GEHRING, Cincinnati, Ohio, Leslie S. Landen, Middletown, Ohio, for Appellee.

OPINION

HARRY W. WELLFORD, Circuit Judge. Plaintiff Richard T. "Tim" Keever was a police officer with the City of Middletown ("City"), and suffered on-the-job-injuries to his neck, shoulders, back, and legs in the late 1980's. In the years following his injuries, he missed an excessive amount of work, and disputes arose about the legitimacy of his absences. In November of 1993, as part of an agreement with the City, just before arbitration on a grievance, Keever resigned from the force and filed for disability benefits, receiving a 45% permanent disability retirement. In August of 1995, Keever led this action against the City under the Americans with Disabilities Act ("ADA"), 29 U.S.C. § 12101, *et seq.*, and the Ohio discrimination statutes, claiming that the City failed to accommodate his disability, unlawfully harassed him about disability, and constructively discharged him from the force. The magistrate judge granted summary judgment in favor of the City, finding, among other things,

that Keever was not "otherwise qualified" for the position sought and Keever now appeals.[1] We AFFIRM for the reasons indicated.

Keever was employed by the City of Middletown Police Department ("MPD") as a uniformed police officer for some fifteen years. Except for his sporadic attendance problems, Keever received average to above average performance ratings, and was cited on occasion for bravery on duty.

On several occasions during the mid-1980's, Keever suffered on-the-job injuries while subduing criminal suspects. Keever still claims to suffer from effects of those injuries. Stress, both work-related and otherwise, exacerbates his physical problems, causing depression and pain. Keever also suffers from periodic headaches and from side effects related to medications he takes. He also has experienced domestic problems for some time.

Over many years, Keever was absent from work between 17 and 26 days per year because of his injuries. During the first three quarters of 1993, the period in question, Keever worked 121 days and was absent about 32 days, The parties disagreed about whether Keever could use his injury leave for absences or whether he had to exhaust his sick leave.[2] Keever, along with his union representative, Magill,

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[1] The parties consented to final disposition of this case by a magistrate judge.

[2] Generally, the City's injury leave policy provides that an injured employee is entitled to six months "time off because of and

filed a grievance protesting the City's handling of Keever's sick leave. Keever states that the confrontation caused by the grievance contributed to the gradual deterioration in his relationship with his superiors.[3] Through a settlement agreement, Keever retired in November of 1993, claiming to be disabled, in exchange for restoration of his sick leave hours which he was allowed to redeem for about $4,600. Keever then applied for and received disability retirement benefits from the Ohio Police Pension and Disability Fund. In support of his application, Keever and his health care providers certified that Keever was permanently and partially disabled. The fund gave Keever a 45% disability retirement. Keever has made no offer to return the benefits received in the settlement agreement.

After following administrative procedures, Keever filed suit, claiming that his alleged forced retirement constituted an unlawful constructive discharge, in violation of the ADA and the corresponding Ohio disability discrimination statutes. *See* OHIO REV. CODE §§ 4112.02 and 4112.99. He claimed that he was harassed because of his disability and because of his disability-related absences from work. In addition, Keever claims that the department refused to accommodate his disability by not allowing him to work on the 11:00 p.m-to-7:00 a.m. shift, which he claims is less

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following the injury," and is typically used during one block of time. Sick leave, on the other hand, may be accrued annually and may be used at any time as needed. If an of officer reports off sick, he is normally charged with accrued sick time.

[3] Keever cites instances in his brief where his superiors accused him of malingering and "goofing off".

stressful, or by not transferring him to a detective position, which he claims is also less stressful.[4]

In July of 1996, the City filed a motion for summary judgment. In December of 1996, the magistrate judge entered an order granting the City's motion, concluding:

> 1. Keever was not "otherwise qualified" for the position, having rejected a reasonable accommodation which would enable him to perform the essential functions of his job;
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> 2. Keever's representation of disability to his pension fund precluded him from establishing that he was "otherwise qualified;"
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> 3. Keever was not constructively discharged, because the City took no adverse action against him; and
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> 4. The evidence fails to establish any hostile environment claim.

We review a district court's grant of summary judgment *de novo*. *City Management Corp. v. U.S. Chem.* Co., 43 F.3d 244, 250 (6th Cir. 1994). In doing so, we must view the evidence and all inferences to be drawn therefrom in a light most favorable to the nonmoving party *Id; Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir.

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[4] Though his original complaint contained a claim pursuant to the Family and Medical Leave Act, 29 U.S.C. § 2611, *et seq.*, that claim was withdrawn.

1996). Summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In accordance with this standard, we have stated the factual background in a light most favorable to Keever.

A plaintiff sets out a prima facie case of disability discrimination if he proves that he is a "qualified individual with a disability," which is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); see *Kocsis,* 97 F.3d at 882. The issue here is whether Keever was "otherwise qualified" to perform the essential functions of his position with reasonable accommodation.[5] *Estate of Mauro* ex rel Mauro *v. Borgess Medical Center,* 137 F.3d 398, 402-03(6th Cir. 1998) (discussing the "otherwise qualified" requirement); *Monette v. Electronic Data Sys. Corp.,* 90 F.3d 1173, 1183-84 (6th Cir. 1996) (same),

The magistrate judge found that Keever was disabled within the meaning of the Act, but that he was not "otherwise qualified" because he rejected a reasonable accommodation offered by the City that would have enabled him adequately to perform the duties of an officer. Specifically, the City offered to let Keever work the desk job in the department, because the reduced activity might reduce his stress and physical symptoms so that his attendance would improve. The

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[5] It is undisputed that Keever is unable to perform the essential functions of his position without some accommodation.

City hoped that this proposed accommodation would have allowed Keever to maintain the same pay and benefits, and his seniority would not have been affected.

Keever, however, did not want to work the desk job, "because it was used as a punishment tool. Another thing is, [he] was wanting to be a police officer out on the street, not inside." Keever thought also that the desk job carried with it less prestige, and he suggested other accommodations that would suit him. First, he asked to do detective work, or second, he suggested that he could be placed on what he claimed was a less stressful 11:00 p.m.-to-7:00 a.m. shift, rather than the day shift to which he was assigned. Keever also maintained that he should have been able to choose which shift he preferred because of his seniority. The City rejected Keever's requests. According to his supervisor, Bruck, Keever was looking for a position "where he didn't have to come to work every day," and because his attendance was so erratic, Bruck did not think that the detective position was suitable. The City's policy was to have set shifts for its employees.

The district court found that the City's offer of a desk position constituted a reasonable accommodation for Keever's disability. Under the ADA regulations, the employer has the ultimate discretion to choose between effective accommodations. See 29 C.F.R. pt. 16:10, app. at 415. It is well-settled that "an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided." *Hankins v. The Gap,* 84 F.3d 797, 800-01 (6th Cir. 1996) (citing, *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 611-69 (1986)). The

regulations also provide that if an employee rejects the offered reasonable accommodation "that is necessary to enable the individual to perform the essential functions of the position . . . the individual will not be considered a qualified individual with a disability." *Id.* at 801 (citing 29 C.F.R § 1630.9(d)). Keever maintains that the City's offer to provide him with a desk job was not a reasonable accommodation.

As indicated above, Keever maintains that the desk job was not a reasonable accommodation for his disability because he believed that the position involved significantly diminished material responsibilities and that it was demeaning. He was of the opinion that it involved less challenges and satisfaction than the job of being an officer on the street. The City, on the other hand, argues that offering Keever the desk job was reasonable as a matter of law because the pay and benefits would have remained the same, and it would have reasonably accommodated the restrictions imposed on Keever due to his disability and spasmodic absences.

Keever relies on *Kocsis* for the proposition that equal pay and benefits are not determinative of the issue, but that they are only factors to weigh in deciding whether assignment to another position is a reasonable accommodation. He argues that the court should consider different factors, such as a less distinguished title, significantly diminished material responsibilities, and others set out in *Kocsis,* 97 F.3d at 886. In *Kocsis,* however, we analyzed not whether a reassignment to a different position was a reasonable accommodation, but whether such reassignment was an adverse employment decision. In fact, we found that Kocsis did not even have a disability, *Id.* at 884. Nevertheless, we assumed for the sake of argument that Kocsis had a disability to address the

employer's argument that Kocsis' reassignment to a different position did not constitute a materially adverse action. We held that reassignments without salary or work hour changes ordinarily do not constitute adverse employment decisions for purposes of establishing a prima facie case of discrimination. *Kocsis,* 97 F.3d at 885.

In determining whether an accommodation is reasonable, the employer must consider (1) the particular job involved, its purpose, and its essential functions; (2) the employee's limitations and how those limitations can be overcome; (3) the effectiveness an accommodation would have in enabling the individual to perform the job; and (4) the preference of the employee. 29 C.F.R § 1630.9(a), appendix. As stated by the lower court, the regulations provide that a disabled employee is not required to accept an accommodation, but if he chooses to reject the accommodation, and he cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability." 29 C.F.R. § 1630.9(d).

Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir, 1996), is analogous. In that case, the plaintiff suffered from stress-induced migraine headaches. To reduce her chances of getting such headaches, Hankins requested that she be moved to another area of the employers warehouse that would be less stressful than her customary area. Rather than transfer her, the employer found that Hankins was more adequately accommodated by the company's leave and medical policies. Hankins was eventually fired, and she sued in federal court claiming that The Gap failed reasonably to accommodate her disability. This court held that the Gap made available

reasonable and effective accommodations to Hankins, and that even if Hankins' requested accommodations were also reasonable, the employer had the discretion to choose which accommodation to provide. *Id.* at 800. Similarly, we conclude that the desk job offered to Keever was a reasonable accommodation, although it did not provide him with his *preferred* accommodation.

Keever still claims to suffer from his injuries, and his problems are exacerbated by the routine duties of an "out on the street" police officer. He is restricted to lifting no more than 45-50 pounds. Keever needs a job where frequent absences will not adversely affect the operation of the department, and would allow him to work short shifts. The City claims that Keever's absences caused multiple problems for the department. We find no error in the decision that offering Keever a desk job where his physical and mental responsibilities are significantly reduced, in combination with allowing him to take leave when necessary, is a reasonable accommodation for his type of injury. *See* 29 C.F.R pt. 1630, app. at 407 (leave time is another form of reasonable accommodation). The City has the discretion to choose whichever reasonable accommodation it sees fit. See *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1016 (7th Cir. 1996) ('"ADA does not obligate an employer to provide a disabled employee every accommodation on his wish list.").

Accordingly, we affirm the magistrate judge's determination that Keever was not "otherwise qualified" for his position. Consequently, we need not specifically rule upon the propriety of the magistrate judge's finding that Keever's representation to the Ohio Police and Firemen's Pension and Disability Fund that he was totally disabled precludes him

from arguing that he was otherwise qualified to perform his job as a patrol officer. We do consider this a factor, however, in reaching our decision as to whether Keever was otherwise qualified.

The magistrate judge also found that Keever failed to adduce sufficient evidence to create a genuine issue of material fact regarding whether he was constructively discharged. To maintain this claim, Keever would have to show that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Easter v. Jeep Corp.*, 750 F.2d 520, 522-23 (6th Cir. 1984). Keever also claimed that he was subjected to a hostile work environment, and that he was harassed by others in the department because of his disability and his disability-related absences. We affirm those findings essentially for the reasons stated by the lower court. There is nothing in the record to show that the City constructively discharged Keever; rather, he simply made a personal decision to resign. Furthermore, Keever has failed to establish any facts concerning whether the harassment he claims took place was severe enough to create an objectively hostile work environment. Conversations between an employee and his superiors about his performance does not constitute harassment simply because they cause the employee distress.

In sum, we AFFIRM the conclusion of the district court base on its finding that Keever was not "otherwise qualified" for the position of patrol officer, that Keever was not constructively discharged, and that Keever failed to establish a prima facie case of hostile work environment discrimination.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Richard T. Keever, *Plaintiff*	)	Case No. C-1-95-716
vs.	)	
City of Middletown, Ohio, *Defendant*	)	

ORDER

This mater is before the Court on defendant City of Middletown, Ohio's motion for summary judgment (Doc. 11), plaintiff Richard Keever's response and. amended response (Docs. 17, 18) and defendant's reply. (Doc. 22). The parties have consented to fatal disposition of this case by the undersigned United States Magistrate Judge. (Doc. 23).

Plaintiff brings this case alleging handicap discrimination and harassment in violation of the federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et. seq. and the Ohio Civil Rights Statute, Oh/o Rev. Code §

4112.02 et. seq.[1] Plaintiff alleges that he was constructively discharged from his employment with the City of Middletown because defendant; (1) refused to reasonably accommodate his disability; (2) eliminated him from assignment to extra duties; (3) ridiculed and harassed him for using injury leave as a result of his disability; and (4) refused to permit his use of injury leave instead of sick leave for absences resulting from his disability. Plaintiff also alleges that he was harassed and subjected to a hostile work environment because of his disability,

Defendant contends that summary judgment is proper because plaintiff fails to establish a *prima facie* handicap discrimination case. Defendant asserts that plaintiff is not otherwise qualified to perform the essential functions of his former position. Defendant also contends that plaintiff was neither discharged nor subject to any other form of adverse employment action,

Plaintiff contends that summary judgment is inappropriate because genuine issues of material fact exist as to: (1) whether defendant failed to reasonably accommodate plaintiff's disability; (2) whether defendant's failure to accommodate plaintiff's disability combined with defendant's alleged ridicule and harassment of plaintiff constituted a constructive discharge; and (3) whether defendant condoned the allegedly abusive and hostile environment to which

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[1] Plaintiff initially asserted a claim under the Family Medical Leave Act (FMLA), 29 U.S.C. § 2611 et. seq. At the hearing on the within motion, plaintiff stated on the record that the FMLA claim is withdrawn. Accordingly, plaintiff's FMLA claim is dismissed.

plaintiff was subjected in an effort to force his resignation.

BACKGROUND

During the 1980's, plaintiff allegedly suffered a number of injuries in the line of duty. As a result of those injuries, plaintiff suffered chronic spasmodic pain in various parts of his body, especially in his back. Plaintiff cannot predict when he will suffer pain, but stress, both work-related and otherwise, exacerbates his physical problems. Plaintiff also suffers from periodic headaches and from side effects of various medications he takes as a result of his on-the-job injuries Plaintiff alleges that he is disabled as a result of his injuries and headaches.

During the late 1980's and early 1990's, plaintiff was absent from work at least seventeen, and as many as twenty-six, days per year. During the first three quarters of 1993, plaintiff worked one hundred twenty-one days and was absent approximately thirty-two days. The parties agree that before plaintiff left his employment, whether voluntarily or not, a dispute arose as to whether plaintiff was entitled to use injury leave for his absences or whether he was required to use sick leave, It is undisputed that plaintiff initiated a grievance proceeding for a determination of this issue under the applicable collective bargaining agreement. The parties eventually entered into a stipulated agreement settling the claim and plaintiff subsequently retired. An issue disputed in the present case is whether plaintiff's retirement was voluntary or a constructive discharge.

Plaintiff contends that he was verbally harassed by his superiors in the police division as a result of his absences

from work. Plaintiff further alleges that he was removed from the Water Recuse and Special Response Teams and was not permitted to perform off-duty work for extra pay. Finally, plaintiff alleges that defendant refused to accommodate his disability by allowing him to work on the third shift, which he alleges to be less stressful, or by transferring him to a detective's position.

In 1993, plaintiff applied for disability retirement benefits from the Ohio Police and Fireman's Pension and Disability Fund (the Pension Fund). In support of his application, plaintiff and his health care providers certified that plaintiff was permanently and partially disabled. The Pension Fund awarded plaintiff a forty-five percent disability retirement, and plaintiff retired on November 8, 1993.

Defendant argues that plaintiff could not perform the essential functions of the position in question; therefore, he fails to establish a handicap discrimination claim under either the federal or state statute. Defendant also contends that attendance is an essential function of a police officer position. Defendant argues that plaintiff's attendance record is dispositive of the issue of his ability to perform the essential functions of his job. Defendant contends that plaintiff has admitted he cannot perform the essential functions of his job inasmuch as he has sworn that he is intermittently incapable of running, sitting, or performing various other functions of a police officer. Defendant argues that plaintiff was removed from the Water Rescue Team due to his physical problems and poor attendance record. Defendant also contends that the Special Response Team was disbanded and that once the team was reconvened, plaintiff failed to apply for membership. Defendant asserts that plaintiff was removed from off-duty

work following episodes in which he performed off-duty work and subsequently failed to report for regular duty. Finally, defendant contends that plaintiff was not discharged, but voluntarily resigned. Defendant argues that consequently plaintiff fails to establish a *prima facie* handicap discrimination case.

DEFENDANT'S SUMMARY JUDGMENT MOTION WILL BE GRANTED

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a motion for judgment as a matter of law. In response to a summary judgment motion properly supported by evidence, the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *Sixty Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams,* 873 F.2d 929, 931 (6th Cir. 1989). "[After a motion for summary judgment has been filed, thereby testing the resisting party's evidence, a factual issue may not be created by filing an affidavit contradicting [one's own] earlier deposition testimony." *Davidson & Jones Dev. Co. v. Elmore Dev.* Co., 921 F.2d 1343, 1352 (6th Cir. I991).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson,* 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of fact. *Street v. J.C. Bradford & Co.,* 856 F.2d 1472, 1479-80 (6th Cir. 1989); *Frito-Lay, Inc. v.*

Willoughby, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson,* 477 U.S. at 249-50:

> If, after an appropriate time for discovery, the opposing party is unable to demonstrate a *prima facie* case, summary judgment is warranted. *Street,* 886 F.2d at 1478 (citing *Celotex* and *Anderson).* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

I. PLAINTIFF FAILS TO ESTABLISH A PRIMA FACIE DISABILITY DISCRIMINATION CASE.

It is unlawful under both the federal Americans with Disabilities Act (ADA) and the Ohio handicap discrimination statute for an employer to intentionally discriminate against a qualified individual with a disability because of that person's disability or handicap.[2] The ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual with regard to job application

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[2] The reasoning in this opinion with respect to plaintiff's discrimination claims asserted under the ADA applies with equal force to plaintiff's state law claims brought under the Ohio handicap discrimination statute. *See Little Forest Medical Center v. Ohio Civ. Rights Comm.,* 575 N.E.2d 1164, 1167 (Ohio 1991).

> procedures, the king, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). The purpose of these disability discrimination statutes is to promote the employment of all persons based on their ability rather than an actual or perceived handicap, and to prohibit an employer from arbitrarily discriminating against an otherwise qualified person because of an actual or perceived disability.

Under the ADA, the term "discriminate" includes failing to make reasonable accommodation for the known physical or mental limitations of an otherwise qualified employee, or denying employment opportunities to an otherwise qualified employee where the denial is based on the employer's obligation to make reasonable accommodation. 42 U.S.C. § 12112(b)(5)(A). An otherwise qualified employee is one who, with or without reasonable accommodation, can perform the essential functions of the employment position that he holds. 42 U.S.C. § 12111(8).

In order to establish a *prima facie* disability discrimination case, plaintiff must prove that: (1) he has a disability; (2) he is otherwise qualified for the job; and (3) he was denied a reasonable accommodation for his disability or was subject to an adverse employment action because of his disability. *Kocsis v. Multi-Care Management, Inc.* 97 F.3d 786, 882-83 (6th Cir. 1996); *Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996). Once plaintiff establishes *a prima facie* case, to rebut the presumption of liability defendant must present a legitimate, non-discriminatory reason for the

adverse action taken against plaintiff. *Kocsis,* 97 F.3d at 883 (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973)). Where defendant demonstrates a legitimate nondiscriminatory reason for the employment action taken, plaintiff must then prove by a preponderance of the evidence that defendant's proferred reasons are merely a pretext for discrimination. *Id* (citing *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981)). Plaintiff may not rebut defendant's proffered legitimate reasons by simply relying on the evidence produced in support of his *prima facie* case. Rather, plaintiff must present additional direct or circumstantial evidence tending to show that he was subject to adverse employment action because of his disability. *See Manzer v. Diamond Shamrock Chemical Co,* 29 F.3d 1078, 1083 (6th Cir. 1994); *Abbot v. Federal Forge, Inc.*, 912 F.2d 867, 871 (6th Cir. 1990)(proof of discriminatory motive is crucial).

In the present case, it is undisputed that plaintiff has a disability. Plaintiff contends that defendant failed to reasonably accommodate his disability and that he was constructively discharged. Plaintiff contends that defendant failed to accommodate his disability by refusing to permit him to work his preferred shift, and refusing to transfer him to a detective's position. Plaintiff also claims that defendant's offer of a desk officer position was not a reasonable accommodation. Defendant argues that plaintiff was not otherwise qualified for his job as a police officer because he could not perform the essential functions of the position. Defendant also argues that plaintiff's award of disability benefits under the Pension Fund is conclusive evidence that plaintiff was not otherwise qualified for the job. In addition, defendant argues that it neither refused to accommodate

plaintiff nor constructively discharged him. Defendant contends that plaintiff voluntarily resigned.

Plaintiff Is Not Otherwise Qualified

Plaintiff claims that defendant failed to accommodate his disability by refusing to permit him to work his preferred shift and by refusing to transfer him to a detective's position. Plaintiff admits that defendant offered him a transfer to a desk officer position. However, plaintiff argues that such an accommodation was not reasonable because it was tantamount to a demotion. Plaintiff alleges that he rejected the desk assignment because it would not have reduced his work-related stress and because it was less prestigious than a patrol officer's position.

Under the ADA regulations, an employer providing the accommodation has the ultimate discretion to choose between effective accommodations.. 29 C.F.R. pt. 1630, app. at 415. Such an employer may choose the less expensive accommodation or the accommodation that is easier to provide. Thus, an employee cannot require, his employer to provide a specific accommodation if another reasonable accommodation is provided instead. *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800-01(6th Cir. 1996)(citing *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 68-69 (1986)). Reasonable accommodation may include making job facilities accessible to persons with disabilities, job restructuring, modified work schedules, reassignment to a vacant position, modification of equipment, adjustment of training materials or policies, and other similar accommodations. 42 U.S.C. § 12111(9). In addition, the ADA regulations specifically mention the use of paid and unpaid leave as a potential form

of reasonable accommodation. 29 C.F.R. pt. 1630, app. at 407. Even though an employee is not required to accept an offered accommodation, if he rejects a reasonable accommodation that is necessary to enable him to perform the essential functions of his job, he will not be considered "otherwise qualified." 29 C.F.R. § 1630.9(d). *See also Hankins,* 84 F.3d at 801.

Plaintiff Rejected Defendant's Reasonable Accommodation Offer

Plaintiff's refusal to accept the available reasonable accommodation precludes him from arguing, that other accommodations should have been provided. *Hankins,* 84 F.3d at 801. It is undisputed that the desk officer assignment was offered to plaintiff with the same wages and benefits as his patrol officer position. While the proposed reassignment may have seemed less prestigious to plaintiff, it was not a materially adverse change. *See Kocsis, 97* F.3d at 886. The evidence demonstrates that assignment to the desk job was a responsibility that was rotated among patrol officers. Thus, even if defendant had not made the offer as a reasonable accommodation, plaintiff may still have been required to fill the post for some period of time. A change in employment must be more disruptive than mere inconvenience or an alteration of job responsibilities to constitute an adverse action *Id. See also Flaherty* v. *Gas Research Institute,* 31 F.3d 451,456 (7th Cir. 1994)(semantic change in title and hurt feelings insufficient to constitute adverse employment action where pay and benefits remained the same); *accord, Harlston* v. *McDonnell Douglas Corp.,* 37 F.3d 379, 382 (8th Cir. 1994).

Plaintiff did not have the right to demand a specific accommodation, such as assignment to a preferred shift or to a detective's position when defendant offered him reasonable accommodations such as a desk assignment and leave time. *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1016 (7th Cir. 1996)("ADA does not obligate an employer to provide a disabled employee every accommodation on his wish list"). Plaintiff fails to present any medical or other evidence in support of his assertion that working on his preferred shift or in a detective's position would have been less stressful. In addition, plaintiff was permitted to take leave during the course of his employment. Even though a dispute arose as to what type of leave was appropriate, it is undisputed that plaintiff took some form of leave and that he was never off work without compensation due to his disability. Leave time is clearly another form of reasonable accommodation defendant offered to him. *See* 29 C.F.R. pt. 1630, app. at 407. Defendant has the discretion to choose a reasonable accommodation such as the desk job, rather than plaintiff's suggested reassignments. *Hankins,* 84 F.3d at 800-01. Plaintiff fails to demonstrate that defendant refused to reasonably accommodate his disability. Furthermore, because plaintiff refused to accept defendant's desk officer position, he is not an otherwise qualified individual and cannot establish a *prima facie* disability discrimination case. *Id.* at 802, The Court finds that m the alternative, as set forth more fully below, plaintiff is precluded from arguing that he is otherwise qualified because he represented to the Pension Fund that he was permanently and partially disabled. For the foregoing reasons, defendant's summary judgment motion will be granted on plaints disability discrimination claim.

Plaintiff's Representation of Disability to Pension Fund Preclude Him From Establishing That He Was Otherwise Qualified

It is undisputed that plaintiff applied for and received an award of benefits from the Ohio Police and Firemen's Pension and Disability Fund. In support of his application, plaintiff and his health care providers certified that he was permanently and partially disabled. As noted above, the Pension Fund awarded plaintiff a forty-five percent disability retirement. *(See supra* p. 3). Plaintiff contends that his representations as to disability were based, in part, on defendant's refusal to accommodate his disability. Plaintiff alleges that if he had been properly accommodated, he would not have represented that he was partially and permanently disabled. Defendant argues that plaintiff's representations of disability preclude him from asserting that he was otherwise qualified to perform his job as a patrol officer.

In federal courts, the weight of authority supports the conclusion that an ADA plaintiff who has represented he is disabled in order to obtain disability benefits is not otherwise qualified under the ADA. *Griffith v. Wal-Mart Stores, Inc.*, 930 F. Supp. 1167, 1170 (E.D. Ky 1996)(Bertelsman, J.). As set forth above, defendant did not fail to reasonably accommodate plaintiff's disability. *(See supra* pp.6-7). Thus, plaintiff's representations of disability to the Pension Fund tend to preclude his assertion that he was otherwise qualified to perform his job as a patrol officer. There is an irreconcilable inconsistency between the representations plaintiff made in support of his Pension Fund application and the argument presented to this Court concerning his ability to perform his prior job. *Id.* at 1173. *See also Smith v. Midland*

Brake, Inc., 911 F. Supp. 1351, 1359 (D.Kan. 1995). By his own statements, plaintiff represented that he was unable to perform the essential functions of his job. *See Reiff v. Interim Personnel, Inc.*, 906 F. Supp. 1280, 1290-91 (D.Minn. 1995). Accordingly, plaintiff fails to demonstrate that he was otherwise qualified; therefore, defendant's summary judgment motion will be granted.

The Evidence Fails to Establish That Plaintiff Was Constructively Discharged

Assuming *arguendo* that plaintiff has established the second element of a *prima facie* handicap discrimination case, in order to succeed on his claim he must demonstrate that he was subject to an adverse employment action. Plaintiff contends that he was constructively discharged from his position as a police officer. Plaintiff alleges that the following conduct by defendant supports his constructive discharge claim: (1) he was harassed by his superior officers for his use of leave; (2) he was removed from his preferred shift and forced to work on a shift that was less well-suited to his disability; (3) he was denied a requested transfer to a detective's position; and (4) he was denied certain other rights such as assignment to the Water Rescue and Special Response Teams and assignment to off-duty work for extra pay.

In order to establish a constructive discharge claim, plaintiff must show that "working conditions would have been so difficult or unpleasant that a reasonable. person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982); *Easter v. Jeep Corp.*, 750 F.2d 520, 52223 (6th Cir. 1984). The question of whether a plaintiff was constructively discharged

depends on the facts of each case. The Court must inquire into both the intent of the employer and the reasonably foreseeable impact of the employer's conduct on the employee. *Held,* 684 F.2d at 432. A constructive discharge claim exists only where plaintiff can demonstrate that a reasonable employer would have foreseen that a reasonable employee would feel constructively discharged. *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1249 (6th Cir. 1989). Plaintiff establishes a constructive discharge claim where he demonstrates that defendant's conduct has created intolerable conditions that a reasonable person could not be expected to bear. *Darnell v. Campbell County Fiscal Court,* 731 F. Supp, 1309, 1313 (E.D. Ky 1990).

Barring unusual circumstances, a transfer at no loss of title, pay, or benefits does not constitute an adverse employment action. *Id.* Thus, reassignments without salary or work hour changes do not ordinarily amount to an adverse employment action. *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Ct. 1987). However, an adverse employment action might be indicated if an employee received significantly diminished material responsibilities. *Kocsis*, 97 F.3d at 886 (citing *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). To determine whether an employment action is adverse, the Court may consider the following factors: (1) termination of employment; (2) a demotion evidenced by a decrease in wage or salary; (3) a less distinguished title; (4) a material loss of benefits; (5) significantly diminished material responsibilities; and (6) other factors unique to a particular situation. *Id.*

As set forth above, (*see supra* pp.6-8), defendant's failure to transfer plaintiff to another shift or to place him in

a detective's position does not constitute a materially adverse action; therefore, as a mater of law, such conduct cannot be the basis for a constructive discharge claim. *Kocsis,* 97 F.3d at 887, n. 18. *See also Hartsel v. Keys,* 87 F.3d 795, 800 (6th Cir. 1996)(failure to promote plaintiff to what she perceived as her rightful position does not create intolerable working conditions. To hold otherwise would create cause of action for every employee who has ever been passed over for a promotion). Similarly, the offer of a desk officer's position does not constitute an adverse action amounting to a constructive discharge. Plaintiff was not forced to accept the desk officer position. Leave time continued to be available to him as an alternative accommodation. (*See supra* p. 7).

As for plaintiff's other allegations asserted in support of his constructive discharge claim, there is nothing on the record to show that defendant constructively discharged plaintiff. Rather, the record demonstrates that plaintiff simply made a personal decision to resign. *See Kocsis, 97* F.3d at 887. While plaintiff may have been angered or hurt by defendant's refusal to permit his participation on the Water Rescue and Special Response Teams, there is no evidence that defendant would have foreseen that plaintiff would feel constructively discharge by such action. Plaintiff never applied for membership on the Special Response Team after it was re-established. Furthermore, plaintiff was only refused off-duty assignments after he had been granted off-duty work and then subsequently failed to report for his regular duty assignment. None of the actions taken by defendant had an adverse impact on plaintiff's ability to perform his job. None of these actions made it more difficult for plaintiff to perform his regular duty assignment. Denial of membership on the Water Rescue and Special Response Teams, like a failure to

promote, does not create intolerable working conditions. *Hartsel,* 87 F.3d at 800.

Finally, plaintiff contends that he was subjected to harassment by his supervisors concerning his use of leave, thereby subjecting him to intolerable working conditions. The evidence indicates that plaintiff's supervisors sometimes used harsh language in challenging plaintiff' s use of injury leave and when discussing plaintiff's absences from work. The parties agree that there was a dispute concerning whether plaintiff was entitled to use injury leave or sick leave for his disability-related absences. However, it is undisputed that plaintiff was pursuing this issue through the grievance procedures under the applicable collective bargaining agreement. Regardless of whose interpretation of the collective bargaining agreement is proper, there is no evidence that plaintiff's supervisors did not sincerely believe that plaintiff' s absences from work were excessive and that his performance was faltering. The ADA does not prohibit an employer from discussing job performance or alleged misconduct, including absences, even where the conduct is caused by plaintiff's disability. *Maddox v. University of Tennessee,* 62 F.3d 843.847 (6th Cir. 1995). See also Tyndall v. Nat'l Educ. Centers, 31 F.3d 209, 215 (4th Cir. 1994).

While plaintiff has presented evidence showing that at one point he was brought to tears by defendant's actions, the evidence indicates that his distress was the result of defendant's refusal to transfer him to his preferred position or shift. Likewise, even though plaintiff has presented evidence tending to indicate that defendant hoped plaintiff would retire, such evidence must be considered in conjunction with defendant's desk job offer. In light of that offer, there is no

genuine issue of fact remaining as to whether defendant was trying to force plaintiff's resignation. Plaintiff fails to demonstrate either that a reasonable person in plaintiff's position would have felt compelled to resign, or that defendant would have foreseen that plaintiff would feel constructively discharged. Thus, plaintiff fails to establish a constructive discharge claim. See *Wheeler,* 875 F.2d at 1249. Plaintiff fails to demonstrate that defendant subjected him to an adverse employment action, and thereby fails to establish a *prima facie* disability discrimination case. For the foregoing reasons, defendant's summary judgment motion as to plaintiff's discrimination claim will be granted.

IL PLAINTIFF FAILS TO ESTABLISH A PRIMA FACIE HOSTILE ENVIRONMENT CLAIM

Plaintiff also claims that he was harassed on the basis of his disability, as evidenced by the conduct that allegedly gave rise to his constructive discharge claim. Plaintiff claims that this harassment created a hostile and abusive work environment.

The Sixth Circuit Court of Appeals has tacitly recognized a claim of hostile environment harassment under the ADA.[3] *Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.*, 1992 WL 57241, at *5-6 (6th Cir. March 25, 1992). *See also Spells v. Cuyahoga Community College*, 889 F.Supp. 1023, 1026-29 (N.D. Ohio 1994). Accordingly, the ADA is violated when an employee is subject to harassment because

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[3] The Court assumes without deciding, and for the purposes of this order only, that Ohio law recognizes a parallel claim.

of his disability that is sufficiently pervasive to alter his employment conditions and create an abusive or hostile working environment. *Harris v. Forklift Systems*, 114 S.Ct. 367, 370-71 (1993). The harassment must be severe or pervasive enough to create an objectively hostile or abusive work environment as well as one that plaintiff himself perceives as hostile or abusive. *Id.* at 370. An objectively hostile environment is one that a reasonable person could find to be hostile or abusive.

In order to determine whether plaintiff has established a *prima facie* hostile environment case, the Court must consider the totality of the circumstances. *Id.* at 371. In reviewing the totality of the circumstances, the Court may consider the following factors: (1) the frequency of the discriminatory conduct; (2) the conduct's severity; (3) whether the conduct was physically threatening or humiliating or a mere offensive utterance; and (4) whether the conduct unreasonably interfered with plaintiff's work performance. *Id.* *See also Crawford v. Medina General Hospital,* 96 F.3d 830, 835 (6th Cir. *1996)(applying Harris v. Forklift Systems* totality of the circumstances test to hostile environment claim asserted under ADEA). While offensive comments may contribute to creating an actionable hostile working environment claim, the mere utterance of an epithet or use of harsh language that engenders offensive feelings in an employee does not sufficiently affect employment conditions so as to violate the ADA. *See Harris,* 114 S. Ct. at 369-70.

Plaintiff argues that the conversations between himself and his supervisors concerning his performance were harassing because they focused on his attendance which was affected by his disability. Plaintiff contends that these

conversations caused him mental and emotional stress and resulted in additional absences, thereby affecting his job performance. Nevertheless, plaintiff fails to present evidence sufficient to create a genuine issue of fact as to whether he was harassed because of his disability. Likewise, plaintiff fails to establish the existence of any fact issues concerning whether the harassment was severe enough to create an objectively hostile work environment. As discussed above, the conduct complained of is insufficient to support a constructive discharge claim. The conduct seems to have engendered bad feelings between plaintiff and other police department personnel. However, mere offensive utterances are insufficient to establish a hostile environment case. *See Crawford*, 96 F.3d at 836. As noted above, defendant is not precluded by the ADA from addressing performance and attendance concerns. Conversations between plaintiff and his superiors about his absences and performance do not automatically constitute harassment simply because they cause him additional stress. Furthermore, there is no evidence that defendant's refusal to place plaintiff on the Water rescue or Special Response Teams interfered with his ability to perform his regular duties. Considering the totality of the circumstances, there is no issue of fact as to whether the conduct was severe enough to create a hostile and abusive working environment. For the foregoing reasons, defendant's summary judgment motion as to plaintiff's hostile environment claim will be granted.

IT IS THEREFORE ORDERED THAT:

Defendant's summary judgment motion is GRANTED. This case is DISMISSED from the docket of this Court.

SO ORDERED.

Date: 12/17/96 /s/_____
Timothy S. Hogan
United States Magistrate Judge

APPENDIX C

APPLICABLE STATUTORY AND REGULATORY PROVISION

42 U.S.C. § 12101(b)

It is the purpose of this Act:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to insure the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102(2)

Disability. The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111(9)

Reasonable Accommodation. The term "reasonable accommodation" may include -

(A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities.

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12112

(a) **General Rule**. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge

of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes -

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration -

(A) that have the effect of discrimination on the basis of disability;

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or

benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability; if such denial is based on the need of such covered entity to make reasonable accommodation to the physical

* * *

APPENDIX D

BNA'S AMERICANS WITH DISABILITIES ACT MANUAL

SECTION 1630.2(o). Reasonable Accommodations

An individual is considered a "qualified individual with a disability" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the positions held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. It should be noted that nothing in this part prohibits employers or other covered entities from providing accommodations beyond those required by this part.

Part 1630 lists the examples, specified in title 1 of the ADA, of the most common types of accommodation that an employer or other covered entity may be required to provide. There are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not

intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces. Providing personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation. Senate Report at 31; House Labor Report at 62; House Judiciary Report at 39.

It may also be a reasonable accommodation to permit an individual with a disability the opportunity to provide and utilize equipment, aids or services that an employer is not required to provide as a reasonable accommodation. For example, it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee.

The accommodations included on the list of reasonable accommodations are generally self explanatory. However, there are a few that require further explanation. One of these is the accommodation of making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. This accommodation includes both those areas that must be accessible for the employee to perform essential job functions, as well as non-work areas used by the employer's employees for other purposes. For example, accessible break rooms, lunch rooms, restrooms etc., may be required as reasonable accommodations.

Another of the potential accommodations listed in "job restructuring.: An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires a qualified individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made a part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position. See Senate Report at 31; House Labor Report at 62,

An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position required the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job. See *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979).

An employer or other covered entity may also

restructure a job by altering when and/or how an essential function is performed. For example, an essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour. Likewise, as a reasonable accommodation, an employee with a disability that inhibits the ability to write, may be permitted to computerize records that were customarily maintained manually.

Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not available to applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodations.

Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms or pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the totality of the circumstances. As an example, suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the

employer should reassign the individual to the position when it becomes available.

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer, however, is not required to maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled. It should also be noted that an employer is not required to promote an individual with a disability as an accommodation. See Senate Report at 31-32; House Labor Report at 63.

The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations. This process is discussed more fully in Section 1630.9 Not Making Reasonable Accommodation.

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Filed August 29, 1996

RICHARD T. KEEVER	)	
Plaintiff-Appellant	)	
	)	
v.	)	Case No. C-1-95-716
	)	(Beckwith, J.)
CITY OF MIDDLETOWN, OHIO	)	
Defendant-Appellee	)	

/

AFFIDAVIT OF RICHARD T. KEEVER

I, Richard T. Keever, having been duly cautioned, hereby swear as follows:

1. I am the Plaintiff in the above case.

2. Throughout my fifteen (15) years with the Middletown Police Department as well as with the South Lebanon Police Department, I received numerous citations for bravery and going beyond the call of duty. Two in particular which stand out were pulling a 7-month old child out of a burning apartment in South Lebanon, saving his life and in rescuing an individual out of a burning trailer in Middletown. All of these citations

are in my personal file.

3. The reason I vigorously grieved the attempt by the City to force me to use sick leave instead of injury leave for my on-the-job injuries, was that I felt the need to save my sick leave for times when I really was sick. Sick leave, unlike injury leave, can be accumulated from year to year. I earned it and I wanted to use it for its legitimate purposes, *i.e.*, for sicknesses. Also, sick leave, unlike injury leave, can be cashed in.

4. It is true that when the SWAT team was reactivated, I did not reapply to be on it. However, this was because it was my feeling that it would be a futile act for me to do so. I had

[p.2]

already been told by my supervisors that I was a malingerer. They also questioned my integrity and my dependability. They had already indicated to me that I was being deprived of extra-duty assignments. Therefore I legitimately felt that it would be useless for me to attempt to get back on the SWAT team.

5. With regard to the water rescue (SCUBA) team, I deny any allegation by the police department that I was taken off the team because I missed too many training sessions. I was on the SCUBA team for ten (10) years and I attended the vast majority of all training sessions. There were a lot of police offices who missed more training sessions than I did, who

were not removed from the SCUBA team.

6. I ultimately entered into a settlement agreement in October of 1993, in which I retired from the police department on disability in return for restoration of sick leave hours, based on many factors, none of which predominate. It was a combination of the fact that:

A. Various majors, lieutenants and sergeants harassed me verbally on several occasions for using sick and injury leave that I had earned.

B. The City deprived me of my membership on the SCUBA team which I really valued.

C. The City took away my right to work extra duty.

D. The City deprived me of the shift I desired, *i.e.*, the 11:00 p.m. to 7:00 a.m. shift that by seniority I should have received under police department custom. The City also denied me the accommodation of assignment to a detective position which would have been less stressful, and would have lessened my muscle pains and headaches on the job.

[p.3]

E. The City reneged on the issue on which I had previously grieved and won regarding counting the days off as injury versus sick leave.

F. The City downgraded me on performance evaluations for my time off.

G. The City repeatedly threatened to involuntarily retire me.

H. Also, based on the City's wrongful conduct, my sick leave bank had been virtually exhausted and that any further time off that I would be taking due to my disability-related absences would be charged as leave without pay. That meant I would be deprived of the income I desperately needed.

I. Also, the harassment which was directed towards me, especially the charges by various of my supervisors that I was malingering and "fucking the system," brought me to tears on a couple of occasions because I knew the charges were totally false and I was trying my best to do my job. Yet without accommodation, I could not endure the physical pain that it cause me.

J. There were also pressing domestic problems. Due to my wife's disability, which involved a lot of medical bills, some of which I had to pay for myself, I had to file bankruptcy in 1992. The City's harassment and discrimination as set forth above put me in such a desperate position that I felt I would be better off financially if I just grabbed the $4600 in cashed-in sick leave that they were

offering me as well as the assured retirement income that I would receive based on my disability allowance, even though it would be far less than the salary I would earn as an active policeman.

7. Without the accommodations which I felt were proper, *i.e.*, remaining on the 11:00 to 7:00 shift or becoming a detective, I was basically destined to be forced to perform a job that

[p.4]

I was physically unable to perform. I could just not stand the stress of the daytime or afternoon shifts without some sort of accommodation, which the City was dead set against giving me. Therefore I felt no alternative but to apply for disability.

8. Even though I technically had a right to arbitrate my latest 1993 grievance, I did not regard that arbitration as very meaningful since the City had already reneged on an earlier grievance which I had won. Even if I had won the arbitration, I had every reason to believe the City would a few months later again violate the grievance settlement by charging me with sick time instead of injury time off.

9. The position of desk office has been universally held in disrepute by all the police officers. It is regarded as punishment and is generally given to police officers with lesser competence or as punishment. The job

the job of actually serving the public on the street or as a detective.

10. When I entered into the settlement with the City on October, 1993, the only claim I was settling was the grievance itself. At no time was there any discussion of me giving up my right to sue under the Americans With Disabilities Act or any other disability discrimination laws. In fact at the time, I did not know there was a law called the Americans With Disabilities Act. I had no idea there was a law requiring employers to accommodate disabilities.

11. I deny ever telling anyone on the police department, either a fellow officer, union member or member of management, that I wanted a job in which I could come and go as I pleased or be absent as much as I liked. My goal was to do work for the police department which would minimize my absences. That is precisely why I wanted to stay on the 11:00 to 7:00 shift or become a detective. I had in fact served as a detective on the Middletown Police Force

[p.5]

here in 1980-1982. I worked in narcotics investigation. I had good evaluations and never received adverse comments about my performance.

12. As a result of my retirement, I now earn a disability pension of approximately $16,800 a year. This compares to an annual salary in 1993 as a police officer of approximately $40,000 per year.

13. I deny that when we first went to Les Landen's office on October 19, 1993 to get ready for arbitration, that it was my idea to seek a settlement whereby I would resign and retire. At no time did I discuss such an option with either my attorney, Tim Evans, or my union representative, FOP president John Magill. The first time I heard that this was an option was when Mr. Magill and Mr. Evans told me that it was the City's idea that I retire as part of the grievance settlement.

FURTHER AFFIANT SAITH NAUGHT.

/s/_____
Richard T. Keever

Sworn to before me and subscribed in my presence by Richard T. Keever, this 28th day of August, 1996.

/s/_____
D. Bergman, Notary Public

APPENDIX F

MIDDLETOWN DIVISION OF POLICE
SENIORITY LIST

June 14, 1993

Earl R. Smith, Chief of Police

Major Hess	1
Major Becker	2
Major Bruck	3
Lt. Owens	1
Lt. Hoffman	2
Lt. Jeffery	3
Lt. Schwarber	4
Lt. Reiring	5
Sgt. Schmidt	1
Sgt. Henson	2
Sgt. Marsh	3
Sgt. Watson	4
Sgt. Curtis	5
Sgt. Efker	6
Sgt. R. Walton	7
Sgt. Moore	8
Sgt. Van Arsdale	9

POLICE OFFICERS

J. Chapman	100
E. Prewitt	101
W. Hollister	102

R. York	103
R. Knabel	104
W. Campbell	105
G. Gentry	106
M. Davis	107
J. Malott	108
T. Alfrey	109
R. Sloan	110
T. Gentry	111
J. Kristanoff	112
E. Philpot	113
C. Walton	114
W. Smallwood	115
G. Gingerich	116
F. Hensley	117
J. Combs	118
H. Shuemake	119
R. Keever	120
W. Rogers	121
J. Lampert	122
J. Griffith	123
R. Hale	124
T. Strumpf	125
W. Sorrell	126
J. Hall	127
T. Riggs	128
J. Magill	129
J. Terrill	130
K. Cunnagin	131
M. Specht	132
T. Mann	133

Middletown Division of Police Seniority List

D. Schwartzel	134
R. Stewart	135
S. Efker	136
S. Reeve	137
L. Fultz	138
K. Robinson	139
P. Brennan	140
D. Brinkman	141
J. Brown	142
R. Wyatte	143
R. Bowling	144
C. Jones	145
P. Albrecht	146
R. Bush	147
S. Getter	148
J. McGuire	149
R. Muterspaw	150
T. Lawson	151
K. Jones	152
T. Flack	153
T. McIntosh	154
J. Chase	155
S. Ezerski	156
R. Simpson	157
S. Winters	158
B. Reese	159
L. Hellmuth	160
K. Weidner	161
J. Rawlins	162
A. Briggs	163
J. Cunningham	164
Vacancy	165
Open	169

DISPATCHERS

T. Oney	1
L. Arehart	2
C. Miller	3
R. Hale	4
K. Shyers	5
D. Bowley	6
C. Kelly	7
C. Demostenes	8
K. Pierce	9

CORRECTION OFFICERS

K. Oldham	1
B. Hopkins	2
R. Collier	3
L. Fitzwater	4
J. Brammer	5
R. Wells	6
D. Depew	7
M. Jones	8
W. Birch	9
C. Alfrey	10

HUMANE OFFICER

J. Agee	1

APPENDIX G

EXCERPTS FROM DEPOSITION OF POLICE CHIEF EARL SMITH

FILED
August 21, 1996

[p.25]

Q. Is there a separate kind of certification you need to be a detective? Do you have to have a certain -- you got to take a certain test you become a detective?

A. No. That's an assignment. But you would get additional schooling once he got to that assignment.

Q. And I assume he would get what special training once he got that assignment?

A. Criminal investigation.

Q. But that's after he got the assignment?

A. Yes.

Q. I can't imagine why someone would want it, but maybe someone would want to be a desk officer. Is that another thing they just apply for?

A. It's not the most desirable assignment, but the patrol commander may just arbitrarily assign someone there

on a rotation by seniority or whatever.

Q. When you say seniority, what do you mean by that?

A. Well, the less senior person would get that assignment first.

Q. I take it that's because it's deemed to be a less prestigious, less desirable job?

A. No, just that some of the officers would

* * *

[p.27]

of myself here. Choice of shifts; you know, you got these three shifts, midnight, morning and afternoon. What governs who gets on which shift?

A. Seniority and personal preference determines who gets day turn or the preferred shift. What that means is if a fellow had all the seniority that he could get, he may still want the midnight shift, so it's his personal preference plus his seniority.

Q. Right. So if two people wanted the 11:00 to 7:00 shift, 11:00 p.m. to 7:00 p.m. shift, one person had five years seniority and the other 10 years seniority, the guy with 10 years would get it?

A. That's correct.

Q. And that would go for any other shift that someone

has a preference for?

A. That's correct.

Q. Is it your basic experience that most -- and, again, there are always exceptions to the rule -- that most want the morning shift? Is that the most popular shift? Or you tell me.

A. It seems the older officers eventually want the day shift.

Q. Okay. They get it because they have more seniority?

[p.28]

A. If that's their preference, yes.

Q. Once someone is assigned to a shift, do you take people from time to time and rotate them the way other cities do? You work for the morning shift for three months and then you rotate to the afternoon shift and rotate to the evening shift and back to morning again?

A. No. The senior has a bid once a year for shift preference.

Q. Is that a written posting that goes out to all the patrolmen?

A. Yes.

Excerpts of Deposition of Police Chief Earl Smith

Q. Preference and seniority govern?

A. Seniority and preference.

Q. Okay. What you're saying basically is if someone is already on the 11:00 p.m. to 7:00 a.m. shift, and then the beginning of next year a posting goes around, if that senior person still wants that shift, he get it unless someone else higher than him wants it?

A. That's correct. That's correct.

Q. Okay. Now what you just described, is that written down in this contract anywhere, or is that just custom.

A. I think it's developed as custom and as

* * *

[p.34]

also called the scuba team, the water rescue team? Are they the same thing?

A. That would be the same thing.

Q. The S.W.A.T. team and scuba team, who determines who gets on there?

A. Those two different teams are staffed by officer preference. They volunteer for it to the shift commander -- or, I'm sorry, the deputy chief in charge of patrol.

Excerpts of Deposition of Police Chief Earl Smith

Q. Take us through that. I mean, is there a posting once a year for S.W.A.T. team and scuba team?

A. No, I think there was a posting when the numbers dropped low enough in the S.W.A.T. team or the scuba team.

Q. Okay. Has there been a situation where more people have shown a preference or desirability to be either on the scuba team or the S.W.A.T. team and there weren't enough openings to fulfill everyone's wishes?

A. I couldn't answer that. Deputy Chief Hess could answer that for you.

Q. Do you know whether seniority plays a role in deciding who gets on a S.W.A.T. team? If there are two people qualified and one's more senior than the other, does the more senior get on?

[p.35]

A. That could be a major factor.

Q. Is that something Major Hess would know about?

A. Yes.

Q. About other job classifications -- let's say someone wants to be a detective, someone's tired of being a patrolman and he wanted to be a detective. Take us through the selection process, how that comes to be?

A. There would be a posting that there was an opening in detective section, requesting anyone that has an interest to submit their name in writing and summary of brief qualifications, and that would go into a request file. And the hierarchy of the police department would make that determination based on this individual's work record, et cetera, attendance, training.

Q. You look for someone who has training as a detective in a prior job?

A. Look for someone who is probably more articulate, more skilled at interviewing, whose testimony in court is good, those kind of basic things.

Q. If more than one person has equal qualifications and has an interest in being detective, does seniority govern which one of them get in?

* * *

[p.117]

were there any openings for detective?

A. There was some transfers withing that organization, yes.

Q. Okay. Was Mr. Keever considered for any one of those transfers?

A. Yes.

Excerpts of Deposition of Police Chief Earl Smith

Q. And how many times were there openings?

A. Probably at least two. Three, possibly.

Q. Okay. And why wasn't Mr. Keever chosen?

A. Number of reasons.

Q. Okay. Go ahead.

A. Number one, one of the disqualifying factors was his use of sick leave.

Q. Why, because he used too much of it?

A. Yes.

Q. What else?

A. Training and his specific request was to work on auto thefts. We don't have the luxury of assigning someone specifically to auto theft. That's all general assignment over there, and it's serious shootings, murders, et cetera. It means coming out at 3:00 in the morning, 4:00 o'clock in the morning. It would not have been conducive to Mr. Keever's condition.

Q. Where does it say here that he would only be interested in working in auto theft?

[p.118]

A. I remember something in here about specifically auto

theft investigation to be considered.

Q. Where are you reading that, sir?

A. First paragraph, third line.

Q. Did you interview him for this position?

A. No, we discussed it with staff.

Q. You said there was a third reason? Or was there a third reason that he wasn't qualified?

A. Well, he doesn't lay out any qualifications as to what schools he's availed himself of, those kinds of things.

Q. Did the other two candidates that got those jobs, did they have special schooling?

A. Some of them did, yes, probably.

Q. Do you know for a fact?

A. No.

Q. Didn't you say at the beginning of your depositions today, Chief Smith, that when people are talked on into the detective division, they get training after they start there?

A. Both. Some people are more ambitious. By the time they come to the department, they'll have availed themselves to school and pay for their own school.

Excerpts of Deposition of Police Chief Earl Smith

[p.119]

Q. Of all the three reasons you just mentioned; extensive absenteeism, the fact that , he in your words, only wanted automotive theft work, and lacked sufficient training, which one of those weight most heavily in your mind as to why he should be disqualified from detective?

A. His absence.

Q. Okay. I take it by absences you are not talking just about calling off and being absent during or adjacent to time off periods, you are talking about the general level of absenteeism in general; is that correct.

A. All of it.

Q. Okay. Now getting back to Officer McGill. Do you recall Officer McGill suggesting that maybe Officer Keever ought to be put on a particular shift which would help minimize the stress to him and help minimize his absences? Do you recall any dialogue with Officer McGill on that particular point?

A. I don't believe I do.

Q. You don't recall Officer McGill saying he ought to be put on the 11:00 to 7:00 shift, that way he can take his medicine when he gets off and sleep it off and be ready the next day at 11:00?

A. No.

Excerpts of Deposition of Police Chief Earl Smith

* * *

[p.121]

leave.

Q. Okay. Was this what you meant -- Strike that. Was this an option that you were considering with Major Hess about going to the law department and having Officer Keever involuntarily retired?

A. Yes.

Q. And did you tell Officer McGill that you were going to do this, too?

A. I don't recall telling him that, no.

Q. Okay. And just to make sure I understand you, sir, you were going to do this because of, in your words, Officer Keever's abuse of the sick leave?

A. Yes.

Q. Now when you say this, again, are you talking about his overall absenteeism rate?

A. Yes.

Q. Okay. Irrespective of whether he's malingering or not, he was just absent too doggone much and it was a drain on the police department?

A. Yes.

Q. Okay. Did you ever tell Officer Keever himself that you were thinking of having him involuntarily retired?

A. I don't recall, no.

Q. Did you tell Major Hess to tell Officer

* * *

APPENDIX H

DEPARTMENT OF PUBLIC SAFETY
DIVISION OF POLICE

December 4, 1992

TO: Ptl. Tim Keever

FROM: Major Russell Hess

SUBJECT: Sick Leave Usage

On December 3, 1992 the following met to discuss a usage of sick leave that has occurred by Officer Tim Keever during the past year (see attachment). Those present were Major Hess, Ptl. J. Magill, and Ptl. T. Keever.

We discussed the history of the officer's injury and his attendance record for the past few years. It is noted that this officer has improved this year over the previous three year period.

This officer wants to remain on the 11-7 shift for health and personal reasons and feels his transfer to the 3-11 shift would not be beneficial as the activity level would be more than the 11-7 shift. The argument is well taken and if this is found to be aggravating his condition he is to request to see me via the chain of command. It should be noted that in all probability he would be transferred to the day shift as the activity level would be less on this shift and we could evaluate the relationship of activity vs. attendance.

Memo from Smith to Keever - Dated 12/4/92

A discussion was held on setting a goal for time in an effort to get him to improve (if possible) on days absent. I told Tim that he would be on doctors notice for 6 months from today. This would see him re-revaluated on June 4, 1993. His extra work permit will stay in effect and he will be permitted to work overtime.

Several numbers were discussed on what goal would be a realistic goal for this six month period for sick leave usage. I believe Tim had started one day a month; I do not feel this is realistic or obtainable. One and one half days per month were discussed which would be eighteen days over a years time. As he had only used 15 1/4 days this year this would not be an improvement. I think a more realistic goal would be seven (7) days over the first six months and six (6) days over the last six month period for a total of 13 days over the years time.

[p.2]

To give Tim more incentive I will try, if at all possible, to place Tim on the 11-7 shift after June 4th, if he has met his goal of seven or less days for the six month period. If he meets the yearly goal of thirteen days his efficiency would reflect a rating of above the unacceptable category.

If this is acceptable, please sign - I have already signed and will stand by what I will do if you meet the goal.

It should also be noted that the officer is using days off for problems that are alleged to have resulted from a prior injury on duty. It should also be understood that I do not want the officer working if his ability is impaired so that he cannot

safely do his assigned duties.

/s/_____
Russell D. Hess
Deputy Chief

RDH/jm

cc: Personnel File
Lt. Owens
Lt. Jeffrey
Lt. Schwarber
J. Magill

/s/_____
Tim Keever

APPENDIX I

EXCERPTS FROM DEPOSITION OF
FOP PRESIDENT JOHN MAGILL

FILED
August 29, 1996

[p.67]

A. No. Because, like I said, it can't be done but that was something that they would throw at Tim regularly and this went on over a period of years, that by the time the '93 grievance was filed and that was named specifically in that grievance, you have to remember that there are facts that relate to that, that go back to '88 and prior to the filing of the '88 grievance that would come up regularly from various management. After all, if this doesn't go away we will retire you.

Tim was concerned about that and, hey, can they do that, and I kept telling him no, they can't. It's only a threat and it concerned me. It concerned me, too, because it had to do with the mind-set of the people we were dealing with.

We were talking about '93 which is just three years ago. This is a 1990's mind-set. It had to have happened at least 30 years before. It was outside of my experience that that was possible.

Q. If an officer is physically unable to perform his duties,

is there any provision within the union contract whereby the city can remove him from service?

* * *

already?

A. Not that's jumping to mind. I think I have talked to the Major once. The response to all those was basically, they just laughed.

Q. When you say they just laughed, what was the response? Who is it that just laughed?

A. That would be Major Bruck. He would be the one primarily. He would be the one primarily that I discussed it with and laughingly we will assign the people where we want and we won't have the union trying to do that. I was telling them I was trying to explore ways that Tim would be accommodated and they took it as an insult, like I was questioning their authority by even suggesting ways for them to accommodate Tim.

Q. Whey you say "they"?

A. Who are they? Collectively like, I don't know, anybody I have talked to about accommodation pretty much their response, we will assign people where we want and we don't appreciate you suggesting that you are telling us where to put people. It wasn't a matter of the union telling them where to assign people. It was just my way of trying to explore ways to find an

accommodation. They just steadfastly refused to discuss that.

* * *

[p.107]

Q. At the time that you had that investigative or hit skip section, do you recall when that was made?

A. Yes. It would be about the time of June 18th '93, on or about.

Q. Do you know, at that time, if there were any openings in the department?

A. No, I don't recall.

Q. Once again, do you remember, were there any openings for those two positions?

A. No.

Q. Similarly, with the warrant officer, do you recall if there were any openings for a warrant officer at that time?

A. No, I don't recall. And as far as -- well, never mind, no.

Q. What was the nature of Mr. Keever's disability?

MR. HORDES: Objection. Calls for a medical

conclusion.

Answer the best you can.

Q. Answer as best you can.

A. I don't know. I'm not a medical doctor.

Q. You made some reference to police

[p.108]

administration regarding the Americans With Disabilities Act, correct?

A. Yes.

Q. I'm assuming that you thought Mr. Keever had some disability?

A. Yes.

Q. What I'm asking is, what was that disability?

MR. HORDES: Same objection.

You can answer the best you can.

A. Because of some of the injuries that Tim had received in the line of duty, he was forced to take several kinds of medications that impacted his ability to come to work and do some of what I would call like major life functions. His ability to run, exercise, lift heavy

weights and other things and for those reasons I felt that that would classify him as being disabled, but I felt there would be a place found for him within the Police Department.

Q. You didn't have any disagreement then that Mr. Keever was in fact disabled?

A. Please?

Q. You didn't have any disagreement that he was disabled?

* * *

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
August 29, 1996

RICHARD T. KEEVER *Plaintiff*	)	
v.	)	Case No. C-1-95-716 (Beckwith, J.)
CITY OF MIDDLETOWN, OHIO *Defendant*	)	

AFFIDAVIT OF JOHN D. MAGILL

John D. MaGill, being duly sworn deposes and states as follows:

1. I am currently employed as a police officer with the City of Middletown. I have worked in that capacity since October of 1982. I have served as a detective since May of 1994.

2. I am also the president of the Fraternal Order of Police, Middletown, Ohio Lodge No. 36. The Fraternal Order of Police ("FOP") is the certified collective bargaining agent for the uniformed police

officers employed by the City of Middletown. The FOP is authorized to represent the police officers for purposes of collective bargaining, including but not limited to entering into collective bargaining agreements with the City of Middletown. I have been president of the FOP lodge for approximately eight (8) years.

3. While not officially covered in the current collective bargaining agreement, the consistent pattern, practice and custom of the City of Middletown is to assign shifts to police officers by police department seniority.

4. A grievance was filed in 1988 by the Union, on behalf of Tim Keever over the proper interpretation of Article X, Section 4 of the collective bargaining agreement. The

[p.2]

interpretation of that section was in dispute between the City of Middletown and the FOP. That section of the collective bargaining agreement has remained unchanged throughout the ensuing collective bargaining agreements until 1994, when it was changed.

5. While a detective is supposed to be prepared to fulfill all the functions of a police officer, throughout my two years as a detective I have found that the majority of a detective's time is spent doing semi-sedentary work. Most of my work entails investigating crimes. This involves sitting at my desk making phone calls,

and driving to other locations to interview witnesses to crimes, collect evidence, and to speak with doctors and forensic experts, etc. Very little, if any, time is spent doing the strenuous work that a beat patrolman ordinarily engages in such as apprehending suspects, engaging in chases in squad cars, etc. On an average day I rarely, if ever, wear a gun belt. It is common place that many detectives do not even carry handcuffs or radios at all while they are in the office or in the field.

6. I am aware of at least two individuals who have successfully transferred into the detective division after they either suffered on-the-job injuries or from a disability. They include Gary Gingerich (bad night vision due to diabetes) and William Smallwood (bad back). I know of other individuals who also served as detectives whose physical disabilities would preclude them from working as a beat patrolman on the street, including, nut not limited to, Terry Alfrey and Bob York.

7. I am not aware of any reason why Tim Keever would not make a good detective. He has the experience, intelligence and know-how to do the job. No one from the police department management ever told me that they had any doubts as to Officer Keever's intellectual capability to be a detective or that he was too inexperienced to be a detective. From my

[p.3]

prospective, he would be just as capable of being a

detective as any of the other individuals who I have named above. There is no exam given to candidates for a detective's position.

8. I suggested that Tim Keever be transferred to detectives. I also suggested that the police department have him examined by a physician to determine his capabilities or quit harassing him. Neither Chief Smith nor any of the other police management followed through on these suggestions.

9. I have never been approached by Chief Smith, Major Hess, Major Bruck, or any other members of police management requesting that we work together or speak with Tim Keever's physicians or chiropractors as to what accommodations would be enable him to perform with his disability.

10. There is a job in the Middletown Police Department called "desk officer". There were desk officers on each of the three shifts. From my experience, this position is considered demeaning. It is generally regarded as a job in which people are assigned as either a punishment or when they are deemed to be inexperienced or incompetent. When there was a need to fill the desk officer job, there were rarely any volunteers. It was generally assigned to the person with the least seniority or as noted earlier, to people with low productivity or people who were perceived as being incompetent. The reasons the job is held in such low esteem is that it takes the police officer out of the more satisfying street action or investigation work altogether and places him or her in the position

of answering telephones, handling complaints from irate citizens, and other routine and mundane inquiries. Desk officers often times act as lightening rods for complaints of perceived incompetence by others on the force.

[p.4]

11. With regard to the ultimate negotiation of Tim Keever's separation in October of 1993, at no time was there ever any discussion by any of the parties that Tim Keever was settling any handicap discrimination claims either under state or federal law. The only thing that he was settling was the recent grievance he had filed over the proper interpretation of Article X, Section 4 of the collective bargaining agreement.

12. While there is a certain stress level attached to each beat patrol shift, the 11:00 p.m. to 7:00 a.m. shift by and large has the least stress of all. This is due to two factors: (1) while there are some calls to potential crime scenes, by 2:30, when the bars close, there is very little alleged criminal activity going on. From that point to the end of the shift, it is very quiet; (2) the midnight shift (11:00 p.m. to 7:00 a.m.) is unique in that it is the only shift wherein there are no members of police command staff present, only one (or two) sergeant(s) and one lieutenant. The police officers therefore can do their duties without the tension involved in having their work second guessed or overseen by multiple supervisors. In the absence of multiple supervisors, there is no need to run personal

or trivial errands for them, as oftentimes takes place on the other shifts. This is of particular significance with Tim Keever, inasmuch as due to his use of injury leave, there was always a tremendous amount of tension that I could visibly see between Officer Keever and his supervisors.

13. From my perspective of 14 years in the department, I never perceived that there was much of a problem caused by officers taking days off for sick or injury leave. One police officer or another is absent virtually all the time, and it has been my experience that when they are absent, the work is still performed by the people present with minimal loss of effectiveness in preventing crime and carrying out the other normal functions of a police department.

[p.5]

14. In my 14 years as a police officer, I have notices several instances, besides that of Tim Keever, where officers who utilized injury leave were treated less favorably than officers who did not use injury leave. These individuals were generally given less favorable assignments or were verbally harassed for perceived malingering. For instance, there is the case of Tim Riggs who, like Tim Keever, had once put in for injury leave. Later on, on an unrelated incident, he was forced to take sick leave for emotional reasons. When he came back, he was harassed for being a malingerer, he was taken off the S.W.A.T. team and assigned to the desk officer's job. This contrasts with other police officers who were off for similar

emotional problems, like Wendell Sorrell, who were not treated in this way. In fact, he was given a choice assignment when he came back from his emotional distress leave. However, Officer Sorrell, unlike Officer Riggs, had not put in for the injury leave.

FURTHER AFFIANT SAITH NAUGHT.

/s/_____
John D. Magill

Sworn to before me and subscribed in my presence by John D. Magill, this 28th day of August, 1996.

/s/_____
N. Bergmann, Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Affidavit of John D. Magill was served by ordinary U.S. mail on Robert J. Gehring, Esq. 900 Fourth & Walnut Center, 105 East Fourth Street, Cincinnati, OH 45202 on the 29th day of August, 1996.

APPENDIX K

HANDWRITTEN INTEROFFICE MEMO
BETWEEN VARIOUS MEMBERS OF THE
MIDDLETOWN POLICE DEPARTMENT
MANAGERIAL OFFICERS

TO:	Major Hess
FROM:	Lt. Owens
#1 Campbell	Does not want straight desk. He would rather have relief. If not relief, he wants to walk the street.
#2 Sorrell	Does not want 3-11. Rather work 11-7. I had mentioned in our meeting that he wanted 3-11 shift, but that has changed. I didn't want my information to influence his going to 3-11 when it isn't factual.
#3 Magill	Wants to work day shift. I confirmed this with him tonight. With his effort given in the C.O.P. program, I think his request should be granted. Mann wants to remain on that detail.
Day Desk	If no one wants straight desk, I would make it a six month rotation starting at the bottom. If this is not agreeable to you or Major Bruck, I would recommend Cunragen.

Handwritten Interoffice Memos

Midnight Desk	I would continue a six month rotation. It has not caused any problems and is accepted. Does not have the appearance of punishment or hiding someone on the desk. Bowling was due in January to replace Bush. I would be interested to know why you picked Brown.
T. Artry	I agree with your comments. I am hearing rumors that Lt. Terry might not retire as planned.

Handwritten Interoffice Memos

TO: Lt. Owens

#1 Campbell	I agree goes to day shift.
#2 Magill	I agree goes to day shift.
#3 Sorrell & Keever	I am still agonizing on this one. Both marked they would not like to work days. This leaves 3-11's and 11-7's open. I now understand Sorrell has changed his mind and talking with T. Keever today he also stated he rather not work 3-11's but days are out altogether. Now the quest. is do I move Bowling-Bush-Wyatt-Brown or anyone to a shift they marked (3-11's) they did not want so these two officers get a choice of assignment. I do not believe anyone else has been placed on a shift they advised they did not want.
#4 Mid-Night Desk	Reason - J. Brown fits into the desk is that she has a problem and good reason to remain on mid-nights. To my knowledge she has not worked any other shift or do I believe she has worked the desk. Giving her the benefit and not moving her I placed her in what seems to be the least desirable mid-night position. As with any change it is a give and take situation that being fair to the employee while maintaining a perceived fairness to others and remaining fair to the organization.
#5 Day Desk	If no one wants this Major Bruck or myself have no problem with 6 mos. But be aware it

may be a supervision problem if and when the rotation involves older employees. I would be interested to know why you picked Connagin? We may not want to start at bottom but starting with Cunnagin would not be.

#6 I have moved S. Reeve from days to mid-nights and moved Van to days. After reviewing felt until Lt. Tony goes Van has the edge with time. I moved Chase to mid-nights to make room for Magill. If no one wants day desk I will have to assign one of your now eleven men to it.

#7 Would Wendel be interested in COP? I don't have any problem with his work. Feel he would be good at it. Would be flex hours maybe more attractive than 3-11's. Would you check and advise. This assignment would last until he would want to leave.

Major Bruck ask for desk officers they have until next Wednesday. Final shift should be out after that.

Handwritten Interoffice Memos

Major Hess,

1. Sorrell is going to discuss the C.O.P. detail with his wife. Being able to ride a bike on that detail is attractive to him. He will call you directly on Friday of his decision. If he does not take that assignment he understands that he will probably be assigned to 3-11 shift with the qualifications you are making the assignments. Even though Keever would rather work 11-7, I don't think there would be a problem assigning him to 3-1. I think everyone understands what the motive is and Keever and Sorrell will not present a problem.

2. Day Desk - Where does Combs fit into this. If Campbell wants the relief job under the present set up does he have seniority bidding rights for that job. Could Combs be the Day Desk man. The reason I recommended Cunnager was because of his low productivity.

3. I inquired about Brown's assignment to desk. Your answer was that she has a problem. Is this a problem where she needs to work midnight because of family necessity or other? What I am getting at is that some officers have made statements against her that myself, Sgt. Schmidt & Sgt. Reining have tried to substantiate. We have not been unable to do so. My concern is that someone is telling you this & if so why haven't I been consulted. I don't mean to be jumping to conclusions if the latter is not true.

4. If the day desk officer is rotated every 6 months, in

reality none of the older officers should ever have to work it because of changes every year.

APPENDIX L

EXCERPTS FROM DEPOSITION OF
RUSSELL HESS

FILED
July 31, 1996

[p.156]

the S.W.A.T. team.

Q. Okay. When he came back from his injury, was he allowed to go back to the K9 team?

A. Yes, sir.

Q. And was he allowed to participate in S.W.A.T. activities as a member of the K9 team?

A. As far as I know.

Q. Did you ever have any discussions with the chief, Chief Smith, in 1991, 1992 or 1993 about the general notion of involuntarily retiring Officer Keever?

A. Yes, sir.

Q. Tell us about that. When did those conversations first arise?

A. I have no idea of the dates. I can remember the chief

kept referring to a non-voluntary retirement and I told him, I said, Chief, I think you're operating in the past. I'm not really aware of anything like that anymore. And he said, well, he could get a hold of David Schul and see. And my opinion was there was no such animal.

Q. You're saying he's living in the past? Are you saying that there used to be --

A. I think there probably was. You have to remember, Chief Smith has been a police officer for 39

* * *

Supreme Court, U.S.
FILED
SEP 22 1998
OFFICE OF THE CLERK

(2)

No. 98-345

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

RICHARD T. KEEVER,
Petitioner,

v.

CITY OF MIDDLETOWN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Keever, formerly a police officer for the City of Middletown, Ohio, ("City") brought suit against the City in the United States District Court for the Southern District of Ohio alleging a violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et. seq. The district court granted summary judgment to the City. (App. 12a-31a). The Sixth Circuit Court of Appeals affirmed the grant of summary judgment in a reported decision, *Keever v. City of Middletown*, 145 F.3d 809 (1998).

As detailed below, there is no cause for this Court's review. The Petitioner is requesting that this Court review evidence and facts presented to the trial court and the court of appeals. Both lower courts correctly applied established law to the facts presented in this case. The Sixth Circuit's decision does not conflict with decisions of another federal court of appeals. This case does not present an important question of federal law that warrants this Court's review.

A. The petition misrepresents the factual findings of the district and appellate courts.

Keever retired as a police officer from the City of Middletown in November of 1993. He represented to the Ohio Police and Firemens' Pension Disability Fund that he was disabled and unable to fulfill the functions of a police officer. He was awarded a permanent disability by the police disability fund. The disability fund requires that an officer leave service as a police officer in order to receive pension disability benefits. Through a settlement agreement with the City of Middletown Keever agreed to resign in exchange for restoration of sick leave hours which he was allowed to redeem. *Keever, supra* at 810-11, (App. 3a-4a).

While employed by the City, Keever suffered multiple injuries that caused him significant absences from his duties as a patrol officer. Prior to his retirement, the City provided Keever with sick leave and offered unpaid leave once Keever's sick leave ran out. The City disagreed with Keever's assertion that he was entitled to "injury leave". Nonetheless, the City permitted Keever to arbitrate that issue. However, Keever resigned prior to any determination by an arbitrator as to whether or not he was entitled to "injury leave". *Keever*, *supra* at 819-11, (App. 3a-4a).

In order to accommodate Keever's disabilities, the City offered Keever a "desk job" in addition to providing leave when he was unable to work. "He was never off work without compensation due to his disability." (App. 22a). Keever rejected the offer of a desk job, instead claiming that he should have received a detective's position. Significantly, Keever did not present any medical evidence that he was fit to perform as a detective. Keever also claims that he was entitled to be assigned to a particular shift. No evidence was presented that Keever's requested accommodations would improve his attendance or ability to perform as a police officer.

The district court granted summary judgment in favor of the City concluding that Keever was not "otherwise qualified" for a police officer's position, having rejected a reasonable accommodation which would have enabled him to perform the essential functions of his job. In addition, the district court found that his representation of disability to the pension fund precluded him from establishing that he was otherwise qualified. (App. 21a-24a).

Keever's question presented for review asserts that the City of Middletown chose to reassign Keever to an undesirable position with less responsibility and status for discriminatory reasons. The record does not support such a contention. The district court and the appellate court found that the City attempted to reasonably accommodate Mr. Keever's disability.

The appellate court found that the City "offered to let Keever work the desk job in the police department because the reduced activity might reduce his stress and physical symptoms so that his attendance would improve". *Keever, supra* at 811, (App. 6a). The City actually attempted to work with Keever to allow him to continue to work despite his claim of disability. (App. 7a). The appellate court stated: "We find no error in the decision that offering Keever a desk job where his physical and mental responsibilities are significantly reduced, in combination with allowing him to take leave when necessary, is a reasonable accommodation for his type of injury". *Keever, supra* at 813, (App. 10a).

In short, there is no factual support for the assertion made by Keever that the City "for discriminatory reasons" chose a reassignment to an undesirable position. The district court and the appellate court found that the City attempted to reasonably accommodate Keever taking into account his disabilities and his limited ability to work as a police officer.

Keever continues to assert that he was constructively discharged and subject to a hostile environment. Neither assertion is supported by the record. The appellate court affirmed the district court's grant of summary judgment on these claims finding that there was nothing in the record to support a claim of constructive discharge and that there was insufficient evidence to support a hostile environment claim.

Keever, *supra* at 813, (App. 11a, 28a-30a).

REASONS FOR DENYING THE WRIT

The Petitioner's position appears to be that the Sixth Circuit and the trial court erroneously decided the case and misapplied the facts to the law. Such a fact bound determination does not warrant review by this Court. The Sixth Circuit's decision was a plainly correct application of law. There is no conflict in the circuit courts of appeals. As set forth below, the circuit courts have been consistent in analyzing the employer's obligations to offer reasonable accommodations to disabled employees.

Certiorari should not be granted in this case as the Petitioner is asking that this Court review evidence and facts presented to the trial court and the court of appeals. This Court has consistently held that it will not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error. *See, e.g., Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

A. It is well established under the Americans with Disabilities Act that the employer has the discretion to determine the appropriate reasonable accommodation.

In order to state a claim under the ADA, a claimant must first show that he is a "qualified individual with a disability" within the meaning of the ADA. 42 U.S.C. § 12112. A "qualified individual with a disability" is an "individual who with or without reasonable accommodation,

can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111 (8), 29 C.F.R. § 1630.2 (m).

Under the ADA if an employee rejects the offer of a reasonable accommodation "that is necessary to enable the individual to perform the essential functions of the position ... the individual will not be considered a qualified individual with a disability." *Hankins v. The Gap*, 84 F.3d 797, 800-01 (6th Cir. 1996) (citing *Ansonia Bd. of Education v. Philbrook*, 479 U.S. 60, 68-69 (1986)). Under the ADA regulations it is the employer that has the ultimate discretion to choose between effective accommodations. "An employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided." *Hankins v. The Gap*, *supra*.

29 C.F.R. § 1630.9 (d) states that a claimant "will not be considered a qualified individual with a disability" if he rejects reasonable accommodations that are necessary for him to perform the "essential functions" of the position. Here, the Sixth Circuit held that Keever's refusal to accept available reasonable accommodations precluded him from arguing that other accommodations should also have been provided.

The Sixth Circuit in *Keever* and *Hankins* cited this Court's decision in *Ansonia Bd. of Education v. Philbrook*, *supra*. *Philbrook* was an employment discrimination case under Title VII of the Civil Rights Act of 1964. The court in *Philbrook* held that any reasonable accommodation is sufficient to meet an employer's accommodation obligations under Title VII. The Sixth Circuit in this case and in *Hankins* applied the reasoning of *Philbrook* to the ADA case. Other circuits have also adopted such an approach in evaluating whether an employee who rejects a reasonable accommodation

is entitled to be considered a "qualified individual with a disability" in order to be able to pursue a claim under the ADA. *See, Stewart v. Happy Herman's Chesire Bridge, Inc.*, 117 F.3d 1278, 1285-86 (11th Cir. 1997); *Schmidt v. Methodist Hospital of Indiana, Inc.*, 89 F.3d 342, 344-45 (7th Cir. 1996).

The courts have been uniform in finding that what is required under ADA is an offer of a reasonable accommodation not the offer of a specific accommodation requested by an employee. "The ADA does not obligate an employer to provide a disabled employee every accommodation on his wish list." *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1016 (7th Cir. 1996).

Thus, the courts have consistently rejected the argument put forth by Petitioner that he is entitled to an accommodation of his choosing, instead finding that a claimant will not be considered a qualified individual with a disability if he rejects a reasonable accommodation that is necessary for him to perform the essential functions of a position.

The Petitioner appears to concede that the offer of a "desk job" was indeed reasonable, stating on page 8 of his Petition that: "The Sixth Circuit also correctly held that when there exists an array of reasonable accommodations ... the employer is not legally obligated under the ADA to give the employee the most reasonable or effective accommodation, or even the accommodation preferred by the employee." Under established law, the finding that the employer offered a "reasonable accommodation" precludes any argument that the offer was not reasonable because it did not comply with the employee's demands. *See, Philbrook, supra* at 372. ("We accordingly hold that an employer has met its obligation ... when it demonstrates that it has offered a reasonable

accommodation to the employee").

CONCLUSION

The Sixth Circuit Court of Appeals correctly found that based upon undisputed material facts, the Petitioner was not qualified under the ADA as he rejected reasonable accommodations made by his employer. The court correctly applied well established law. The Sixth Circuit's decision does not conflict with decisions of another court of appeals. There is no important question of federal law presented that should be settled by this Court. Accordingly, for the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Dated: September 21, 1998

Respectfully submitted,

/s/_____

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